# HINDU LAW.

J. R. GHARPURE, B.A., LL.B. (Hons.)

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# ADDENDA.

**P. 19, add after para 4—**

It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them. Where, however, such a custom has been proved, the onus is upon the party who alleges the discontinuance thereof to prove that fact. But such a discontinuance was held not to be established by one instance in which a female having no title had usurped possession of the family property and had then gone through the form of making, by way of a compromise, a gift of it to the rightful heir, there being otherwise clear and consistent evidence of the existence of the custom.—*Sarabjit* v. *Indarjit*, 27 All. 203.

**P. 57, " add to line 25 after** *5 Bom. H. C. R. 181*—

And such an adoption cannot be impeached on the ground that it has the effect of divesting the estate of the junior widow or her infant daughter."—*Narayansami* v. *Mangammal*, 28 Mad. 315.

**P. 59, line 3 add after Sapindas—**

The consent of kinsman is required on account of the incapacity of women to act rather than to procure the consent of all whose interests will be defeated by the adoption.—*Narayanasami* v. *Mangammal*, 28 Mad. 315.

**P. 79, after line 3—**

A guardian of the property cannot be appointed for a minor whose only proprietory interest is as coparcener with adults in joint family property. *Gharib-ul-lha* v. *Khalak Singh*, 30 I. A. 165, 5 Bom. L. R. 478. But this principle will not apply where all the coparceners are minors and a guardian of the property is appointed for the whole number. *Binadjee Luxman* v. *Mathurabai*, 7 Bom. L. R. 809.

**P. 88, add to line 3, see—**

*Sokkanadha Vannimundar* v. *S. V.*, 28 Mad. 344.
see also the observations of Chandavarkar, J., in *Vadilal* v. *Shah Khushal*, 27 Bom. 157 at 160, 161 ; 4 Bom. L. R. 968.

**P. 100, add after para 1—**

But where a contract is entered into on behalf of a joint family business by the managing members of the firm in their own names it is not necessary that any members of the joint family other than those who entered into the contract should be parties to a suit brought thereon ; the managing members are in the position of agents for undisclosed principals.—*Gopal Das* v. *Badri Nath*, 27 All. 361.

**P. 154, add after para 1—**

Under the Hindu law as well as upon general principles, the father of an illegitimate child is bound to provide for its maintenance. A suit lies in the Civil Court for maintenance of an illegimate child notwithstanding an order of the Magistrate, under section 488 of the Criminal Procedure Code refusing to grant maintenance.—*Ghana Kanta Mohanta* v. *Gerelli*, 32 Cal. 479.

**P. 165, add at the end—**

Where a Hindu married woman embraced Islamism and married a Mahomedan according to the forms of Mahomedan law, and had sons by him during the lifetime of her Hindu husband without having been divorced from the latter : it was held that as the sons were illegitimate, she was in the position of an unchaste daughter, and was, under Hindu Law, disqualified from inheriting her father's property.—*Sundari* v. *Pitambari*, 32 Cal. 871.

**P. 186, line 3, from bottom, add after Mitakshara—**

" Subject to the general control of the husband on all *stridhan* property, except Saudayika."—*Bhau Abaji* v. *Raghunath Krishna*, S. A. 218 of 1905. Decided 10th October 1905.

**P. 193, add after para 2—**

Ordinarily a gift by deed or will by a Hindu to his wife does not carry the absolute interest in the absence of some indication of an intention that she should have such absolute interest in the property.

Where a conveyance executed by a Hindu transferring certain property to his wife, after reciting that the executant was in possession as proprietor of shares in certain villages, declared that he of his own free will transferred the share of which he was proprietor to his wife and " put her in proprietary (malikana) possession authorizing her to retain possession of the same as proprietor (malik). together with land revenue, miscellaneous items, &c." Then came this provision :—" In case of proper necessity she as my representative is at liberty in every respect to transfer the property by sale or mortgage, either in my life-time or after my death. No objection taken by any person shall be held as fit to be allowed in this respect"

it was held that notwithstanding the use of the word " malik," the document did not confer an absolute power of alienation on the donee, but she was not empowered to transfer the property either by sale or mortgage unless a legal necessity arose for doing so.—*Jamna Das* v. *Ramantar*, 27 All. 364.

**P. 194, line 17 add after 3 I. A. 72—**

*Manmatha Nath Biswas* v. *Rohilli Moni Dasi*, 27 All. 406.

**P. 202, add before last para, 3 lines from bottom—**

" She cannot will away any property which she takes as *stridhan*, even as a daughter, without her husband's consent, except in the case of Saudayika."—*Bhau Abaji* v. *Raghunath Krishna*, S. A. 218 of 1905, decided 10th October 1905.

# HINDU LAW.

## BOOK I.

### INTRODUCTION.

I. **The Expression Hindu Law, its analysis and justification:—** *Law*, or, *Positive Law* according to Western Jurists (and especially Bentham and Austin) is a command issued by a *Sovereign*, who is politically superior, to *subjects* who are politically inferior, imposing an obligation or *Duty*, attended by a penalty or *Sanction* in case of breach or disobedience and the capacity of an individual to draw down the sanction of the State in case of neglects or breaches of duty is called that person's *Right*.

It is this element of enforcement by a Sovereign or Political authority which distinguishes, according to Austin, Positive Law from all other rules whether enforced by a determinate or indeterminate authority; and Hindu Law being based on the compositions of Private individuals or on Divine Commands, the accuracy of the Expression Hindu Law has been questioned by modern Jurists as being wanting in the Political sanction attaching to it. Austin's theory, however has to be applied with great discrimination and caution, and generally it would not be safe to apply this test to societies which existed and had their own institutions well-established and matured, even long before Austin's theory was launched forth; and even in modern societies, its application cannot be universal as the whole mass of International Jurisprudence will have to be called mere opinion Improperly Called Law.

**The true character of Hindu Jurisprudence:—**

"The true character of Hindu Jurisprudence is in fact different from that of the European system". The obedience to the Smritis etc., was not due to any political authority of their authors, but the veneration in which they were held by those for whom these writings were intended. These lawgivers showed admirable practical good sense in prescribing rules. While apparently professing to follow the Divine Laws and Commands as found in the Vedas and claiming simply to interpret and explain them to the general public, in reality they so moulded these texts as to bring them in conformity with the general sense of their followers—a fact which

secured them a following and obedience which was as universal and strong as that secured by a political authority. The developement of Hindu Law in this way may well be compared with English Equity and Roman Praetorian Legislation which had to pass through similar stages of formation.

But the expression Hindu Law can even stand the test of Western Lawyers if the true origin of the Laws is properly borne in mind. In the East, as well as the West, it is never the King or Sovereign or Political Superior who composes the Laws himself, but it is only with his signature and seal that the Laws which are otherwise composed by private individuals are issued to the world with the Political Sanction imprinted on it. There is only one point wherein the two systems differ. For, whereas, in the West, the authors compose the Code by an authority previously given for the purpose, in the East, the political mark is affixed to the writings which probably were commenced and completed at the individual wish of a private person, but subsequently obtained political sanction and thus came to be laws by ratification subsequently given. The commentary of अपरार्क on याज्ञवल्क्यस्मृति is a very strong instance of this, even if the ordinarily known fact of the universal authority of the स्मृति evidencing their due promulgation by persons in authority be ignored altogether.

## II. Nature and Scope of Hindu Law:—

A. **Nature:**— The authority of these Sanskrit Lawyers is, however, not of universal application. It only affected or was meant to affect the members of the four castes. It did not extend to the aboriginal tribes that existed in India prior to the advent of the Aryan settlers. Indian Law may in fact be affirmed to consist of a very great number of local bodies of usage, and of one set of customs reduced to writing, pretending to a diviner authority than the rest, exercising consequently a great influence over them, and tending, if not checked, to absorb them.

**Mr. Mayne's view.**

According to Mr. Mayne, (1) Hindu Law is based upon immemorial customs, which existed prior to, and independent of, Brahmanism. (2) When the Aryans penetrated into India, they found there a number of usages either the same as or not wholly unlike their own. (3) They accepted these with or without modifications, rejecting only those which were incapable of being assimilated, such as Polyandry, incestuous marriages, and the like, (4) The Brahminical writers simply stated the facts as

they found them, without attaching to them any religious significance. (5) The religious element subsequently grew up, entwined itself with legal conceptions, and then distorted itself in three ways:—(*a*) by attributing a pious purpose to acts of a purely secular nature. (*b*) by clogging these acts with rules and restrictions suitable to the pious purpose and (*c*) by gradually altering the customs themselves, so as to further the special objects of religion or policy, favoured by Brahmanism.

**Distinctive features of Hindu Law:**— The most distinctive features of Hindu Law are (1) The undivided family system, (2) the order of succession and (3) the practice of adoption. "In all these cases," remarks Mr. Mayne, "it will be satisfactorily shown that Brahmanism has had nothing to do whatever with the early history of those branches of the law ; that these existed independently of Brahmanism or even of Aryanism, and that where the religious element has entered into, and remodelled them, the change in this direction has been absolutely modern."

B. **Scope:**—The Hindu Law undoubtedly applies to those who follow the Brahminical religion *i. e.*, यस्मिन्देशे मृग: कृष्णस्तस्मिन्धर्मान्निबोधत। Yâjnavalkya 1. 2. those who believe in the authority of the Vedas, samhitas, smritis etc. But it would hardly be right to limit the application of the law to *bona-fide* followers of the Brahminical faith. Besides those who observe Hinduism as a mere matter of outward form and social convenience; there are classes *e.g.* Brahmos, who do not observe even that outward form and yet are governed by the principles of Hindu Law. The term must therefore be taken to include not only persons who are Hindus by religion but also the descendents of such persons who are not completely ex-communicated from Hindu society, on account of change of religion.

**Law applicable to families professing two religions:**—Where a family observed both Hindu and Mahomedan rites, the Allahabad High Court held that the Hindu Law was applicable. *Roy Bahadur v. Bishen Dayal* 4. All. 343.

The case was apparently one to which the Succession Act did not apply. Now that the Succession Act is the general law of the country, the Hindu Law cannot apply to one who is altogether out of the pale of Hindu Society.

**Christian Converts:**—Before the passing of the Indian Succession Act, it was held that Native Christian Converts from the Hindu

religion were at liberty to renounce the Hindu Law or adhere to it. *Abraham v. Abraham* 9 M. I. A. 195 : 1 W.R.P.C.1.

But now the Indian Succession Act governs all such cases. *Ponnusami v. Dorasami*. 2 Mad. 209. *Dagree v. Pacotti*, 19 Bom. 783.

But a Hindu may succeed, under the Act, to the property of a Christian. *Administrator-General of Madras v. Anandachari*, 9 Mad. 466.

But note that the provisions of the Indian Succession Act are prospective and not retrospective and leave rights unaffected which had already been acquired at the passing of the Act. *Sarkies v. Prosonamoy*, 6 Cal. 795. So that if a person has acquired any interest in any property by birth on account of the family continuing to observe the Hindu Law, the subsequent passing of the Succession Act will not deprive him of that interest. *Ponnusami v. Dorasami*, 2 Mad. 21.

And generally, where, in consequence of conversion from one religion into another, the question arises as to the law to be applied to such a person, that qestion is to be determined by ascertaining the law or custom to which such person attached himself after conversion and by which he preferred that his succession should be governed. *Lastings v. Gonsalves*, 23 Bom. 539.

**Illegitimate sons of a European** :—In a case decided before the Succession Act was passed, the Privy Council held, that the illegitimate sons of a European by two Hindu women, who conformed in all respects to Hindu habits and usages, must for all purposes be treated as Hindus, and governed by Hindu Law as such ; and that their rights of succession *inter se* and to their mother, must be judged by Hindu Law which recognized them and not by English Law which denied them its privileges. *Myna Boyee v. Ootaram*. 8 M.I.A. 400. But now the case will be governed by the Succession Act. See *Barlow v. Orde* 13 Cal. W.R. 41 (**P.C.**) : also see 23 Bom. 539 at P. 543.

**Converts to Mahomadanism**:— Must be governed by that Law. *Sojan v. Roop Ram*, 2 Agra 61.

And succession to their property will be governed by the Mahomedan Law, and the plea of usage opposed to Mahomedan law must not be recognized. *Surmust Khan v. Kadir Dad Khan*, 1 Agra (**F.B.**) 39.

If a contrary usage is set up, the entire burden of proving it will lie upon the party who sets it up. *Rahimatbai v. Hirbai*, 3 Bom. 34 : *Fatu v. Dhondi*, P.J. for 1884 P. 182.

And though the general presumption in such cases is, that the Mahomedan Law governs the converts, still, a well-established custom in the case of such converts to follow their old Hindu Law of inheritance would override that general presumption, and a usage establishing a special rule of inheritance as regards a special kind of property, would be upheld even though at variance with both Hindu and Mahomedan Laws. *Mahomed Siddick v. Haji Ahmed*, 10 Bom. 1.

The **Khoja Mahomedans** and **Cutchi Memons** of the Bombay Presidency are governed by Hindu Law. *Ahmad Bhoy Habiboy v. Cassum Bhoy Ahmed Bhoy*, 13 Bom. 534.

The **Sunni Borah Mahomedans** of the Dhanduka Taluk in Gujrath are governed by the Hindu Law in matters of succession and inheritance. *Bai Baiji v. Bai Suntoke*, 20 Bom. 53.

As also are the **Moslem Girasias** who were originally Rajput Hindus, but were subsequently converted to Mahomedanism. *Fatesingji Jaswantsingji v. Kumar Harisingji Fatesingji*, 20 Bom. 181.

Hindu Law has been held to apply to **Buddhists, Jains** and **Sikhs.** *Bhagwandas v. Rajmal*, 10 Bom. 258 : *Shersingh Rai v. Dakho*, 1 All. 688: *Bachebi v. Makhanlal*, 3 All. 55.

In all these cases, it should be noted, that, though Hindu Law applies to the classes of people enumerated above, it generally is made applicable only in matters of succession and inheritance; and the parties will not be allowed to invoke its aid in other matters, if its provisions are inconsistant with the special provisions of the tenet or sect to which the parties belong. *Sonalaxmi v. Vishnuprasad*, 6 Bom. L.R. 58.

Lastly, **it is a personal Law** and its application is not affected by a change of place. *Mailathi Anni v. Subbaraya*, 24 Mad. 650: *Parbati v. Jagadish*, 29 Cal. 483. **(P.C.)**

**Examination: Short Summary:** A LAW is a COMMAND issued by Political superiors or SOVEREIGNS to Political inferiors or SUBJECTS, imposing an obligation or DUTY, the violation of which is met by a penalty or SANCTION; and the capacity of an individual to draw down such sanction in case of breach is called his RIGHT. This European conception of Law or Positive Law is not applicable to Hindu Law. That conception is modern; Hindu Law is very old.

Hindu Law is a personal law and follows and is attached to persons wherever they go. It applies to Hindus proper and others roughly described as Hindus *e.g.* to the Brahmos, Cutchi Memons, Sunni Borahs of the Dhundaka Taluka, Moslemah Girasias, Jains, Sikhs.

QUESTIONS:— (1) What are the essential elments of Law according to Austin ? State whether the ancient Customary Law of India and the Codes of MANU and YAJNAVALKYA satisfy the requirements of Austin's definition. What is the true view ?

(2) Discuss the real nature of Hindu Law and determine its scope and extent.

(3) Estimate the position of a convert from Hinduism to Mahammadanism and Christanity before and after the passing of the Indian Succession Act.

CHAPTER I.

## The Sources of Hindu Law.

श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः।

सम्यक्सङ्कल्पजः कामो धर्ममूलमिदं स्मृतं ॥ याज्ञवल्क्यः १. ८. *cf.* also मनु II. 12.

Shruti (what was heard), Smriti (what was remembered), usage. among the good, one's own inclination, and a desire based on (*Lit.* born of) good motives—this is remembered as the origin of Dharma. *Yajnavalkya I. 8.*

These are :—

(I) **Written** and (II) **Unwritten.**

The **Written** sources may be thus sub-divided:

A.—The original works, including the Ancient Sanskrit Texts *viz.* The *Sruti* including the Vedas and Upanishads, the *Smritis*, including the *Sutras*, *Primary* and *Secondary* Smritis, Digests or Nibandhas and Puranas.

B. Adjudication.

C. Legislation.

The **Unwritten** Law is *Usage* or *Custom.*

Of these in details;

1. The written sources are.

A. **The Ancient Sanskrit Texts**—including

1. The **Sruti** or what was heard—revelations including the **Vedas** and the **Upanishads.**

   The Vedas are principally four the *Rig*, *Yajus*, *Sâma* and *Atharva.* These are severally sub-divided into *Samhitas*, *Brahmanas*, Shakhas and Upashakhas.

2. (*a*) The **Smritis** or what was remembered may be divided principally into two broad Divisions:—the *Primary* and the *Secondary.* Of the Primary ones properly so called are the *Sutras*, the principal among which are *Shrauta* and *Grihya Sutras* or Sutras relating to the ritual: and *Dharma Sutras* or those dealing with Law properly so called : with these latter class alone we are concerned.

The **principal** among the **Dharma Sutras** are those of Gautama, Baudhayana, Apastambha, Vasistha and Vishnu. These have been translated and are now incorporated into the "Sacred Books of the East" Series.

***Their general characteristics.***—these were, as the word *Sutra* (=a thread or link) indicates short notes or key words given by the Rishis to their pupils at the time of teaching the Vedas, as a help to their memory in retaining the text and import of the Vedas themselves. They were orally transmitted for many ages, before they were committed to writing: and orally taught, as they are even now at the present time.

***Gautama***—is the oldest of all, being quoted by Baudhayana. He belonged to the Sâma Veda. His date has approximately been supposed to be not earlier than 300 B.C.

***Baudhayana***—was originally studied by the followers of the Black-Yajurveda; but subsequently he came to be regarded as a general authority on Hindu Law. He was probably of southern origin, and may have flourished in 2nd century B.C.

***Apastamba***—was also an inhabitant of Southern India, probably of the Andhra District and a follower of the Black Yajurveda. His Sutras show the first symptoms of an advance upon the ancient law of the Rishis, who, professing apparently to interpret and follow the Sacred Texts,in reality, so moulded them, as to adapt them, to the moral and mental attainments of the people of their time. He is remarkable for the uncompromising vigour with which he protests against the practices recognized by Hindu Law viz. the various sorts of sons, the Niyoga, and the Paisacha marriage. He lived probably in the first century B.C.

***Vasishta***—excepting quotations contained in the work, there is nothing to show his date. He appears to have followed the Black-Yajurveda. The internal evidence reveals a strong resemblance and in some places a *verbatim* repetition of the same identical SUTRAS in one or more of these works may be found.

***Vishnu***—No tradition exists as to the authorship of the Vishnu-Sutras. Much of the work bears the mark of extreme antiquity, and portions of it are thought by Dr. Jolly to have been borrowed by Vasishta or even by Baudhayana. He also was a follower of the Black-Yajurveda.

Harita, Hiranyakeshin, Usanas, Kasyapa and Cankha also belong to the Sutra period.

Next in order, come the Smirits or Primary Smirits as distinguished from the Secondary ones, or Nibandhs or Digests, which will be noted later on.

2. *(b)* The principal among the first class are the three smritis of Manu, Yajnavalkya, and Nârada.

***Manu***—The most important of the SMRITIS is the code of Manu. It is regarded as almost equal in holiness to the Vedas. The personality of the author, is, upon the face, mythical. The sages implore Manu to teach them the Sacred Law; and Manu, after relating his birth from Brahman, and giving an account of the creation of the world, requests Bhrigu, one of them, to repeat to others, the law communicated to him. Thus in fact, the author of the work is Bhrigu. There are numerous Commentaries upon this work, the principal of which will be noted later on. The date of Manu is uncertain. It fluctuates from between 1200 and 200 B.C.

***Yajnavalkya***—is next in order of time and importance. No Sutras corresponding to it have been found and the work is supposed by Professor Stenzler to have been founded on those of Manu. Like Manu, this author also has had several commentators. Of the actual author himself, nothing is known. From various traditions, this much is clear, that a certain sage called Yajnavalkya was held in high estimation. His date has been approximately fixed as not later than 4th century B.C.

***Narada***—The last of the complete Metrical Dharma Shastras is the Narada-Smriti. His personality is also mythical. The date of the author has been approximately fixed to be somewhere about the 5th or 6th century B.C.

*N. B.*—Besides these complete works, there must have been many works, the existence of which is demonstrated by constant reference to them by the Commentators. These works in the original are found; but in almost all the cases, portions only are obtainable. A casual glance at either the Mitakshara, or the Apararka Tika, will show that not less than forty authorities have been variously referred to, thirty at least of which are works which are unpublished in part or whole. These are Brihaspati, Katyayana, Angiras, Atri, Daksha, Devala, Prajapati, Yama, Likhita, Vyasa and others.

**Authority of the Smritis:**—All the abovementioned Smritis claim, and are agreed to possess, independent authority. One Smriti occasionally quotes another, as one judge cites the opinion of another judge; but every part of the work has the same weight, and is regarded as the utterance of infallible truth. The statements of law made in all these,

differ greatly from each other and this led *Parashara* to lay down discriminating rules as to their suitability and application in different *Yugas*.

Next in order of importance come the Secondary Smritis, which consist of commentaries on the Primary Smritis, and the Digests or Independent works, based on all the ancient works without being direct commentaries on them.

2. (*c*) **Commentaries**:—

On MANU—are too many in number, as will be seen from Mr. Mandlik's MANAVADHARMA SHASTRA (Bombay). The most noteworthy among these are MEDHATITHI—one of the earliest writer. He lived about the 9th Century. BHARUCHI is next in order, and is cited by VIJNANESHWARA. DHARESHWARA and SHRIKARA have been cited and refuted with great learning by the author of the MITAKSHARA—a fact showing that their opinions must have been held in high estimation at that time. KULLUKA is the only writer whose commentaries on the work of Manu have, from a long time, acquired great popularity and retained it. From his own account, it appears that he was a Varendra Brahmin of Bengal, and that he was an inhabitant of the village Nandana near Gour. It is said that his descendants now live in the District of Beerbhoom. He lived in the 14th Century.

On *Yajnavalkya.*

The first and foremost and the most important is the ***Mitakshara*** by ***Vijnaneshwara.*** Its authority is paramount in all the schools except that of Bengal, where also it is received as a high authority, yielding only to DAYABHAGA in those points where they differ. All that is known, or can be known, of the author is, that he was the son of Padmanabha Bhatta, that he was a PARAMAHAMSA or religions mendicant, and that he was the pupil of UTTAMAPADA. From verses appended at the end of this work, it appears that he was a native of Kalyana and that he flourished during the reign of Vikramarka. His age has been fixed by recent research to be the latter part of 11th century.

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* उत्तमोपपदस्येयं शिष्यस्य कृतिरात्मनः । + + +
नासीदस्ति भविष्यति क्षितितले कल्याणकल्पं पुरं
नो दृष्टः श्रुत एव वा क्षितिपतिः श्रीविक्रमार्कोपमः ॥ + +

***Vishwarupa.***—was the first commentator of Yajnavalkya; his work is lost. Vijnaneshwara refers to him in the introduction to his work. Probably he was the senior contemporary of Vijnaneshwara. He is also cited by Jimuta Vahana.

***Apararka.***—is another commentary on Yajnavalkya, by a writer after whom the commentary is called, or Aditya Deva, as he describes himself. He belonged to the Konkan branch of the princely house of the Silaras who had their seat at Thana. He reigned and wrote between 1140 1186 A.C. shortly after Vijnaneshwara's time. His doctrines closely resemble those of his illustrious predecessor and his work is of great value for the correct interpretation of the Mitakshara.

**Commentaries on Vijnaneshwara's Mitakshara.**

This writer and his work has secured almost a general following: and with the exception of Jimuta Vahana, all the writers are in general accord with him.

His work has been commented upon and explained in works, of which the following are most important.

1. The ***Balambhatti:***—or a commentary by a lady by name Lakshmidevi. Her husband's name was Vidyanath, and he had a son by name Nalakrishna. She cites Nanda Pandita, but not any later author. She must have flourished towards the end of the 17th century. This work is greatly useful in interpreting and understanding correctly the wording and the spirit of the Mitakshara wherever it is found to be vague, or insufficiently clear. It is held in high estimation in the Bombay Presidency.

2. ***Madana Parijata & Subodhini:***—are the works of Vishweshwarabhatta. At the end of the second work, he describes himself as the son of Ambika and Pattibhatta, and born of the family of the Kushikas. The first was written at the command of Indan Pal, King of Kastha. It does not contain any date, but it must have been written in the thirteenth century.

2. *(d)* ***Digests or Nibandhas:***—

***The Vyavahara Mayukha:***—by Nilakanta is the most important digest and has paramount authority in Gujaratha and the Island of Bombay. In the Maharashtra country the authority of the Mayukha is

considered as inferior only to that of Mitakshara. He was the cousin and contemporary of Kamalakarabhatta, the author of the Nirnayasindhu and Vivāda Tàndava. As Kamalakara tells us that his work was finished in 1668 (Samvat=1612 A.D.) the date of Nilakantha is the same. His descendants are still living in Poona and Benares.

***Kalpataru:***—by Lakshmidhara and ***Vivada-Ratnakara :***—by Chandeshwara, the minister of Harasinha Deva, are both important Digests.

***Chintamani:***—by Vachaspatimisra is a work of highest authority in Mithila.

***Daya-bhaga:***—by Jimuta Vahana is the highest authority in Bengal. It is remarkable for its originality and display of legal acumen. He chalked out an entirely new path and in all the most important points his conclusions are essentially different from those of his predecessors. What is most remarkable is, that, although he has controverted the established doctrines throughout, there is scarcely a single inconsistency in his work. Jimuta Vahana appears to have been a Bengal Pandit, for otherwise he would never have been accepted as an authority in Bengal.

There are several commentaries on Daya Bhaga, chief among which are those by Raghunandana, Sree Krishna Tarkalankara and others. Of these, Raghunandan is the highest authority in Bengal in all matters excepting inheritance.

***Veeramitrodaya:***—As Raghunandana is respected in Bengal, so Mitra Misra the author of the Veeramitrodaya is esteemed in the Benares school. Mitra Misra quotes Raghunandana, but not any later author. He follows the Mitakshara. His work was composed under the orders of Veerasimha, the Bundala king, who murdered Abul Fazl. Mitra Misra must therefore have lived at the end of the 16th Century.

***Dattakamimamsa:***—by Nanda Pandita is a great authority on the law of adoption. So also is,

***Dattakachandrika:***—by Mahamohopadhyaya Kubera.

In questions relative to the Law of adoption these two works are equally respected all over India; and where they differ, the doctrine of the latter is adhered to in Bengal and by Southern Jurists, while the former is a conclusive authority in the provinces of Mithila and Benares. It is regarded as supplementary to the Mitakshara and Mayûkha. Per Mahmood J. in *Ganga Sahai v. Lekhraj Singh* 9 All. 322 ; *Waman Raghupati Bowa v. Krishnaji* 14 Bom. 259. *Bhugwan Singh v. Bhugwan Singh* 17 All. 294; S.C. 26 I.A. 131/161.

***Vivadarnava Setu***—was composed at the request of Warren Hastings and is commonly known as Halher's Gentoo code. So also Vivada

Bhangarnava compiled at the instance of Sir William Jones by Jaganatha-Tarka Panchanana and translated by Mr. Colebrooke and hence is generally known as Jaganath's or Colebrooke's digest.

***The Puranas:***—are also referred to as authorities on questions of Hindu Law. *e.g.* the Kalika and the Vishnu purana. Per Mahmood J. *in Ganga Sahai v. Lekhraj Singh* 9 All. 322.

**Rules of Interpretation and Maxims of the Texts:**—

So long as words and sentences carry their ordinary meaning there is no difficulty at all, and they are taken and followed for whatever they lay down. But the difficulty would arise, when any text is found to be in apparent conflict with usage, or is not as complete and expressive as it ought to be, when, the rules of interpretation laid down for interpreting and reading the Vedic Texts are applied, and the passage or passages are explained accordingly. Dr. Bhattacharya has given a very concise summary of these rules and also of the *general Maxims of Hindu Law*, to which reference may be made if necessary.

**Different Schools of Law** :—From what has gone before, it must have been seen that with the general authority of some Ancient Texts there is a special and Local Law having special preponderance in a particular province. These were first described by Mr. Colebrooke as several **schools** of Law. Really speaking there are **only two** principal schools, *viz.*, the Dayabhaga and the Mitakshara. Others less prominent but having a local or special value are also known such as.

***The Benares School:***—where Mitakshara is the leading authority. Subodhini, Veera Mitrodaya, Kalpataru, Dattakamimamsa and Nirnaya Sindhu are regarded as authorities next in importance.

***The Dravida School:***—also with Mitakshara as its basis, is governed by Parasara Madhavya, Saraswati Vilas and Dattaka Chandrika.

***The Mithila School:***—also with Mitakshara as its leader, is guided by Chintamani, Vivada Ratnakara, Dattaka Mimansa, Dwaita Nirnaya, Sudhiviveka and Dwaita Parishista.

***The Bombay School***, including ***the Maharashtra School:***—where, Mitakshara, Vyavahara Mayukha, Nirnaya Sindhu, Dattaka Mimamsa and Kaustubha apply. And

***The Guzrat, (including Ahmednagar) School:***—where Mitakshara and the Vyavahara Mayukha hold.

***The Bengal School:***—founded by Jimutavahana, is governed by the Dayabhaga, Dayakramasangraha, Dattaka Chandrika and the works of Raghunandana and commentaries on the Daya Bhaga.

**As regards the Bombay School** :—The Mitakshara ranks first and paramount in the Maratha Country and in Northern Canara and Ratnagiri, *Jankibai v. Sundra* 14 Bom. 612, while the authority of the Mayukha is supreme in Guzerat, in the Island of Bombay, which formerly formed part of the Gujerat, and in northern Konkan. *Sakharam v. Sitabai* 3 Bom. 353. *Lallubhai v. Mankuarbai* 2 Bom. 418. *Vijayarangam v. Lakshman* 8 Bom. H.C.R. 244. *Krishnaji v. Pandurang* 12 Bom. H.C.R. 65.

In Ahmednagar, Poona and Khandeish, the Mayukha appears to be an authority equal to, though not capable of overruling, the Mitakshara. *Bhagirthibai v. Kanhujirao* 11 Bom. 285, 294. With the differences in details that exist according to the special doctrines of the above schools, the two principal schools differ from each other in the following respects:—

**Points of difference between the Mitakshara and the Daya Bhaga school.**

1. The Daya Bhaga lays down the principle of religious efficacy as the ruling canon in determining the order of succession; consequently it rejects the preference of agnates to cognates, which distinguishes the other systems, and arranges and limits the cognates upon principles peculiar to itself.

2. It wholly denies the doctrine, that property is by birth, which is the corner-stone of the joint family system. Hence, it treats the father as the absolute owner of the property, and authorises him to dispose of it at his pleasure. It also refuses to recognize any right in the son to a partition during his father's life.

3. It considers the brothers, or other collateral members of the joint family, as holding their shares in quasi-severalty, and consequently recognizes their right to dispose of them at their pleasure, while still undivided.

4. It recognizes the right of a widow in an undivided hindu family to succeed to her husband's share if he dies without issue and to enforce a partition on her own account.

**Some further peculiarities of these schools:—**

The **Doctrine** of *factum valet:*—The maxim *quod fieri non debuit factum valet* is a maxim of the Roman Civil Law and means in English, that "what ought not to be done is valid, when done." It was generally applied in the Lower Bengal, and hence it was considered that it was universally and exclusively applicable to Bengal. This mistake has now been corrected and its extent and application has been laid down by Westrop C.J. in *Laksmappa v. Ramappa* 12 Bom. H.C. R. 364 and has since been followed and adopted everywhere. As has been observed by Mahmood J., in *Ganga Sahai v. Lekhraj Singh* 9 All. 295, the application of this maxim does not depend upon any rule of Hindu or Mahomedan Law. This maxim, which owes it origin to Roman jurisprudence, *rests* upon those principles of justice, equity and good concience, which, judges in India are bound to administer, whenever the substantive rules of the local law furnish no clear and unmistakable guide. *Its application* must be *limited* to cases in which the shastra is merely directory.

This **Maxim** is **invoked** in two cases—marriage and adoption—and in both these, its application has been strictly limited to those cases only where the dictates of the Shastras were merely directory, and not mandatory, or imperative, or interdictory. Adoption of an only, or of an eldest son, marriage by mother of the daughter without the father's consent are instances of this. *Mulchand v. Budhia* 22 Bom. 812.

But adoptions and marriages which are specifically prohibited by law can never be validated, and this doctrine will have no application in such cases. *Lakshmappa v. Ramappa* 12 Bom. H. C. R. 364; *Gopal v. Hanmant* 3 Bom. 273: *Bhagirthibai v. Radhabai* 3 Bom. 298: *Ganga Sahai v. Lekhraji Singh* 9 All. 253 at Pp. 295 & 296.

Besides this, there are two more particulars in which the several schools subordinate, and offshoots of the Mitakshara, differ from it in some particulars; and this is to be found in (1) the right of women to inherit in Western India and (2) the remarkable diversity of view regarding the power of a widow to adopt.

B. **Adjudication:**—In the early period, during and after the commencement of the British rule and the establishment of British Courts, the English Judges were, as a matter of course, merely the mouth-pieces of the Pundits upon all disputed points of Hindu Law.

The Pundits were attached to the Courts, and were consulted, and their opinions invariably followed. In some cases their opinions were not exactly in accordance with the literal sense of the Shastras, but they were Hindus living among Hindus of the day, and so whenever a difference appeared between the actually existing usage and the Shastras, they invariably tried to formulate their opinions, so that as far as possible, to bring them in conformity with usage. So long as this continued, the Hindu Law as such was administered to the Hindus. But in course of time, the Judges, no longer content with the Futwahs of the Pundits, began to import their own ideas and principles in the cases that came before them. This, to a great extent, worked a hardship, for, the means of knowledge and acquaintance with Hindu Law were not as copious and complete then, as they now are. However, now a great portion of the Hindu Law is influenced and developed by utteraness from the Bench, which has now furnished cases upon almost every department of Hindu Law. The Case Law has thus come to be another source of the Hindu Law.

(4) **Legislation**:—is another source of Hindu Law, in as much as it has effectively moulded its ordinary course. There are many statutes which have influenced Hindu Law, directly or indirectly. As the principal among these, the following Acts may be noted:

Act *21 of 1850* (Freedom of Religion). By this Act, degradation on account of change of religion bringing on an exclusion from inheritance, has been practically abolished. According to the plain meaning of this Act, only the convert himself can take advantage of it himself. It has however been held in Allahabad that it also protects their sons. *Bhagwan Sing v. Kallu* 11 All. 100. But this would not apply to a joint family, and a member loses all rights therein by conversion. *Gobind Krishna v. Abdul Qayyum* 25 All. 46.

Act *15 of 1856*. (The Widow Remarriage Act). By this Act, the marriage of widows was legalised in all cases. But all rights and interests which any widow may have in her deceased husband's property *qua* widow, shall, upon her marriage, cease and determine as if she had then died. *Vithu v. Govinda* 22 Bom. 321 (and cases cited there). But it has been held that she does not forfeit her right of inheritance as regards the estate of her son by previous marriage. *Chamar Haru Dalmel v. Kashi* 26 Bom. 388. *Basapa v. Rayava* 6 Bom. L.R. 779 **(F.B.)**

Act *21 of 1890*. (Native Converts Marriage Dissolution Act). The conversion of a Hindu wife or husband does not by the very fact

dissolve a previously contracted marriage. *The Government of Bombay v. Ganga* 4 Bom. 330. *Administrator General of Madras v. Anandachari* 9 Mad: 466.

But Hindu husbands and wives changing their religion for Christianity might, under this Act, have their marriage dissolved if the Hindu husband or wife of the convert should refuse to cohabit with such person.

Act *8 of 1890* (Guardians and Wards Act). This Act lays down the limit of minority to 18 in the case of those who are not, and 21 in the case of those who are, under the management of the Court of Wards. Besides these, the following Acts may be noted. Act *10 of 1865*. (The Indian Succession Act). Act *21 of 1870* (the Hindu Wills Act). Act *7 of 1866* (Bombay) (Hindu's Liability for ancestor's debts). Regulation VIII of 1827 (Bombay). Acts II and IV of 1882.

## II The Unwritten Law or Usage.

**General.**

In the original passage quoted above, Achara is given as one of the sources of Hindu Law. This is in full accord with all other systems, where, custom is prominently recognized as a source of Law. The fullest effect is given to custom both by the Courts and by legislation. "Under the Hindu system of Law, clear proof of usage will outweigh the written text of the Law." शास्त्राद्रुढिर्बलीयसि *Collector of Madura v. Mootoo Ramalinga* 12 M. I. A. 436.

All the recent Acts which provide for the administration of the law dictate a similar reference to usage, unless it is contrary to justice, equity or good conscience, or has been actually declared to be void. *Sundar v. Khuman Singh* 1 All. 613.

**Records of Local customs:** Comparatively very little has been done in this direction.

(1) In *Bombay* Mr. *Steele* has collected certain customs and some customs may be found recorded in West and Buhler's Hindu Law.

(2) In the *Punjab* and *Oudh* most valuable records of village and tribal customs, relating to the succession to and disposition of, land have been collected under the authority of the settlement offices: and these are known as *Wajib-ul-arz* (a written representation or petition) and *Rewazi-i-am* (common practice or custom).

(3) Another work of the greatest interest is the *Thesawaleme* or description of the customs of the Tamil inhabitants of Jaffna, on the Island of Ceylon. The collection was made in 1707 under the orders of the Dutch Government and was then submitted to, and approved by, twelve leading natives, and finally promulgated as an authoritative exposition of their usages.

(4) A similar record has been published in *Pondicherry* with the help of nine leading natives, selected with reference to their integrity, special knowledge of laws and usages and above all their fortunes which guaranteed their independence.

(5) A work called *Pachis Sawal* or Twenty-five questions and answers relating to the customs of the Tributary Mahals of Cuttack, is a work of authority on customs prevailing among the Rajas in these Mahals. *Nittanand v. Sreekurun* 3 W.R. 116: *Gopal Prosad v. Raghunath Deb* 32 Cal. 158.

(6) Other customs have been recorded in private treatise of private persons, such as, the Madura Manual by Mr. Nelson, the Malabar Manual by Mr. Logan, and similar Manuals for North Arcot and South Canara by Messrs Cox and Sturrock respectively. An interesting treatise has been published by Dr. Bhattacharjee in 1896 and is known as Hindu castes and Sects.

**Definition and kinds of custom:**—A custom is some established practice at variance with the General Law. It is the spontaneous evolution by the popular mind of rules, of the existence and general acceptance of which, is proved by their customary observance.

They are (1) *Private, e.g.* Kulâchâr or family customs.

(2) *General e.g.* Desâchâr or custom of the District. Jâtyachar or custom of the caste or class, Trade customs.

And (3) *Public*—customs which apply to every member of the state.

The chief **requisites of a custom** are, that it must be

(1) Ancient—*Hurpurshad v. Sheo Dayal* 3 I. A. 285.

(2) Continued, unaltered, uninterrupted, uniform and constant *Jugmohundas v. Mungaldas* 10 Bom. 543.

(3) Peacable and acquiesced in. *Lala v. Hira Singh* 2 All. 49.

(4) Reasonable. *Ibid* and *De Souza v. Pestonji* 8 Bom. 408.

(5) Certain and definite.

(6) Compulsory and not optional, to every person to follow or not. The acts required for the establishment of customary law must have been performed with the consciousness that they spring from a legal necessity. *Ghasity v. Umrao Jan.* 20 I.A. 193: 21 Cal. 149.

(7) And must not be immoral. *The Collector of Gorakhpur v. Palakdhari Singh* 12 All. 16.

(8) And a custom which is opposed to the Ordinary Hindu Law must be proved by those who assert it. *Gitubai v. Shirbakas* 5 Bom. L. R. 318.

**Family customs.**

From the above essentials and the general characteristics specified above, it is clear, that a mere agreement among certain persons to adopt a particular rule cannot create a new custom binding on others, whatever its effect may be upon themselves. It must be essentially ancient and invariably followed. Moreover, a custom does not run with the land. But a long continuing usage may be abandoned and discontinued and evidence of such abandonment or discontinuance may be given. And in this way a usage as to a single family may be proved.

Hindu Law is a personal law; and, a family migrating from one district to another, may show that it was governed, not by the General law of the new place, but by the law of the place to which it originally belonged. *Parbati Kumari Debi v. Jagadis Chunder Dhabal* 29 Cal. 483. S. C. 29 I. A. 82.

And where a family migrated from the N. W. Provinces where the *Mitakashara* Law prevails, and settled in the Jungle Mahals of Midnapore in Bengal, it was held that the presumption is that it continued to be governed by the Mitakshra Law. *Chandika Baksh v. Muna Kuar and others* 29 I.A. 70. And generally, a family custom must be essentially certain, invariable, and continuous; it must be shown to have been ancient and uninterrupted, *Umrita Nath Chowdry v. Gowry Nath Chowdry* 15. W.R. 10 (P.C.)

**Immoral usages.**

An immoral and illegal usage *e.g.* the adoption of girls by prostitutes for purposes of prostitution, cannot be upheld in law. *Mathura Naikin v. Esu Naikin* 4 Bom. 545. See also for Mahomedans. *Ghasita v. Umrao Jan* 21 Cal. 149 (P.C.) But where such an adoption by a prostitute is proved to have been made with the special object of perpetuating the succession to the office, it would not be invalid. *Tara Naikin v. Nana Lakshman* 14 Bom. 90.

Nor can an adoption be disputed where the adoptor, though a prostitute, is of an advanced old age, and has made the adoption with the express purpose of perpetuating the line. *Manjamma v. Sheshgir Rao* 26 Bom: 491.

And generally "the test of such adoption would seem to be,

whether the natural mother of the adopted girl could be convicted under section 372 of the I.P.C., of having disposed of her daughter for the purposes of prostitution, or knowing it to be likely that she would be so employed". Per Candy J. *Ibid. cf.* also *Kamalakshi v. Ramasami* 19 Mad. 127: *Sanjiri v. Jalajakshi* 21 Mad. 229.

**Other cases:**—A custom recognizing the right of heirship of illegitimate sons born of adulterous intercourse has been held to be bad. *Narain v. Laving Bharathi* 2 Bom. 140. And also, a custom for an association of dancing girls to enjoy a monopoly of the gains of prostitution is immoral. *Chinna Ummayi v. Tegarai* 1 Mad. 168.

A custom which authorizes a woman to contract a *Natra Marriage* without a divorce on payment of a certain sum to the caste is similarly an immoral one. *Uji v. Hathi Lala* 7 Bom. H.C.R. 133. But there is nothing immoral in a caste custom by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expenses of the latter's original marriage. *Sankaralingam Chetti v. Subban Chetti* 17 Mad. 479.

**How a custom may be proved:**— " What the law requires is satisfactory proof of usage, long and invariably acted upon in practice, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district of country, and the course of practice upon which a custom rests must not be left in doubt, but be proved with certainty." *Sivananjana v. Muttu Ramalinga* 3 Mad. H.C.R. 75 (affirmed in appeal by the Privy Council). And the same court in *Gopalayyan v. Raghupatayyan* 7 Mad. H.C.R. 250 laid down the following rules for ascertaining the existence of an alleged custom:—

"**First,** the evidence should be such, as to prove the uniformity and continuity of the usage, and the conviction of those following it, that they were acting in accordance with law, and this conviction must be inferred from the evidence.

**Secondly,** evidence of acts of the kind, acquiescence in those acts, decisions of courts or even of panchayats upholding such acts, the statement of experienced and competent persons of their belief that such acts were legal and valid, will all be evidence. But it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted."

**Finally,** the custom set up must be definite, so that its application in any given instance may be clear and certain, and reasonable. *Luchman*

*v. Akhbar* 1 All. 440. Under the Indian Evidence Act, a local or family custom may be proved or disproved by:—

(*a*) Any transaction by which the custom in question was claimed, modified, recognized, asserted or denied, or which is inconsistant with its existence; or by particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from. S. 13. *Urjoon v. Ghunesham* 5 M. I. A. 169.

(*b*) Entries in public records. S. 35. *Lekraj kuar v. Mappal Sing* 5 Cal. 744. *Isri Sing v. Ganga* 2 All. 876.

N.B.—The *Wajib-ul-arz* are records of customs in villages and as such are *prima facie* evidence of the custom alleged. *Kuar Sen v. Mamman*, 17 All. 87. *Isri Singh v. Ganga* 2 All. 876. But such evidence may be rebutted. *Ibid.*

(*c*) The *opinions* of persons likely to know of its existence, or having special knowledge thereon. Ss. 48, 49.

A witness may state his opinion as to the existence of a family custom, and give as the grounds thereof, information derived from deceased persons. But it must be independent opinion based on hearsay, and not on mere repetition of heresay. *Garurudhwaja Purshad Sing v. Saparandhwaja P. S.* 27 I.A. 238, S.C. 23 All. 37 (**P.C.**) Where the existence of any custom is a fact in issue, statements of dead or absent persons are irrelevant. *Patel Vandran v. Patel Manilal* 15 Bom. 565.

But where it is a relevant fact, such statements are relevant under section 32 clause 4 or 7.

**Usage imported:**—In order that the practice of a particular estate may be imported as a term of the contract into a contract relating to land in that estate knowledge of this practice must be proved as against the other contracting party or his assignee. *Manu Vikrama v. Rama Patter* 20 Mad. 275.

***Burial ground:***—Where a certain section of the Mahomedans had been for many years in the habit of burying their dead near a darga in plaintiff's land, and plaintiff sued for an injunction restraining them from exercising this right in future, it was *held* that the right of burial was not an easement but a customary right which being confined to a limited class of persons and within a limited area was sufficiently certain and reasonable to be recognized as a valid local custom. *Mohidin v. Shivlingappa* 23 Bom. 666.

## Various Applications of Customary Law.

"Questions of usage arise in four different ways in India.

**First:**—as regards races to whom the so-called Hindu Law has never been applied: for instance, the aboriginal Hill tribes, and those who follow the *Marumakatayum* Law of Malabar, or the *Alya Santana* Law of Canara.

**Secondly:**—as regards those who profess to follow the Hindu Law generally, but who do not admit its theological developments.

**Thirdly:**—as regards races who profess submission to it as a whole, and

**Fourthly:**—as regards persons formerly bound by Hindu Law, but to whom it has become inapplicable". Mayne.

As regards the first of these, questions relating to these tribes have to be entirely decided according to the usage among them.

It is only with reference to questions which arise under the second and third classes that great care is required in determining the applicability of Hindu Law. It has already been shown above, (Introductory Chapter) that the Hindu Law applies to many more classes of persons than those who are strictly governed by Hindu Theology. But this application is to be limited to questions regarding succession. In other respects, the ordinary incidents of Hindu Law cannot be made applicable *e.g.* though the Hindu Law as to succession applies to Cutchi Memons, the laws of Joint Family and Partition cannot be made applicable at all in their case.

Questions of persons formerly belonging to Hindu Society, but subsequently resorting to another, are generally to be found in India in two cases *viz.* in the cases of Hindus converted to Mahommadanism and to Christianity. These cases have already been noted in a former chapter (Introductory). The Leading case governing converts to Christianity is that of *Abraham v. Abraham.* This case lays down the proposition that "upon the conversion of a Hindu to Christianity, the Hindu Law ceases to have any continuing obligatory force upon the convert. He may renounce the old *law* by which he was bound, as he has renounced his old *religion;* or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion." In this case, upon the particular facts of the case, their Lordships held that Mathew Abraham the ancestor had renounced his old law as well his old religion and that therefore the incidents of Hindu Law were not applicable in this particular case.

**Examination: Short summary**: Like other systems of Laws, the sources of Hindu Law are written and unwritten. All these may be grouped together in a tabular form:—

The Sources of Hindu Law are.

- Written which are.
  - A.—The ancient Sanskrit Texts *viz*:—
    - (1) The Sruti or the Vedas.
    - (2) The Smritis, including.
      - (*a*) The Sutras.
      - (*b*) The Primary Smritis.
      - (*c*) The Secondary Smritis or Commentaries on the Primary ones and Commentaries on these Commentaries.
      - (*d*) The Digests or Nibandhas.
    - (3) The Puranas and Itihasas.
  - B.—Adjudications and
  - C.—Legislations.
- or
- Unwritten.—which is usage or custom.

There are two principal Schools of Hindu Law, viz. the Daya Bhaga School of Bengal and the Mitakshara School which, roughly speaking, prevails throughout elsewhere in India with its special Schools of Dravida, Benares etc. These may be thus grouped together in a tabular form:—

HINDU LAW

- Mitakshara
  - Benares
  - Mithila
  - Bombay
    - Maharashtra
    - Guzerat
  - Dravida
    - Dravida (proper)
    - Karnatik
    - Andra
- Dayabhaga (Bengal)

Per Mahmood J. in *Ganga Sahai v. Lekhraj Singh* 6 All. 291.

These two schools are distinguished by two principal points. According to the one, the principle of religious efficacy is the chief guide in determining the order of succession, while consanguinity determines the succession under the other. Again, the first (Daya Bhaga) denies the doctrine that property is by birth and vests in the father, absolute ownership in the property: while under the Mitakshara joint family, every male member acquires by birth, a distinct right in the family property. As a corollary, the members of a joint family in Bengal hold their shares in quasi severalty, and the widow in an undivided family is entitled to succeed to her husband's share, if he dies without issue and to enforce a partition on her own account.

A custom is some established practice at variance with the general law. It is either, *private, or particular, public* and *general.* It must be ancient, continued, uniform, constant, peaceable and acquiesced in, reasonable, certain, compulsory and not immoral: and being in derogation of general Hindu Law, must be strictly proved. A custom may run with the land and may attach itself to migrating families. It may be proved by adducing evidence of a uniform and continued practice, and, in the case of a family, by the special custom being proved to have been observed from a long time by means of a family record &c. It may also be proved as under Ss. 13, 32, 48, 49 and 35, of the Indian Evidence Act.

Questions.—What are the sources of Hindu Law? Briefly indicate them and point out the comparative superiority of the several Smritis in different parts of India. Estimate approximately the age of the Sutra period, and the dates of Manu, Yajnyavalkya, Neelakantha, and Vignaneshwara.

2. Explain the meaning of the term Schools of Law. Indicate the principal Schools of Hindu Law and point out the chief differences between them. In what particular essential does the Daya bhaga school differ from the Mitakshara School on the law of succession. Illustrate your answer by reference to the order of succession.

3. Explain the doctrine of *factum valet* and estimate its application to questions under the Hindu Law.

4. What are the essentials of a valid custom? When does it become binding? When once a custom is established, can variations from it be allowed? Illustrate your answer with reference to decided cases. Briefly analyse the law on this point by reference to decided cases which apply the principles of Hindu Law *to persons other than Hindus.*

## CHAPTER II.

Closely following, and principally based upon, custom are the two rules as to.

(1) Benami Transactions and

(2) The Law of Dâmdupat.

### I. Benami Transactions.

Benami Transactions are a custom of the country and must be recognized till otherwise ordered by law. *Kally Mohun Paul v. Bholanath Chakladar* 7 W.R. 138.

**Origin:**—These transactions are entered into by anticipition of pecuniary troubles that might arise in future. But in many cases, however, the object is to avoid personal annoyance and oppression by providing an ostensible owner who might appear in Court, &c., to represent the estate. Whatever be the origin, this custom of vesting property in a fictitious owner *i.e.* the *benamidar*, has been long since recognized by courts in India and by the Privy Council.

**The doctrine** of Benami **stated:**—"The Law of Benami" in the words of Sir Lawrence Jenkins C.J. "is founded on principles which are not limited to India: it is nothing more or less than an application of the equitable rule that where there is a purchase by A in the name of B, there is a resulting trust of the whole to A. It is an accepted rule of guidance in all cases to see from what source the purchase-money has proceeded, and it must be shown that the person whose money has gone to effect the purchase, furnished it as purchaser." *De Silva v. De Silva* 5 Bom. L.R. 784. It is a deduction from the well-known principle of equity viz. that where there is a purchase by A in the name of B, there is a resulting trust of the whole to A; and that where there is a voluntary conveyance by A to B, and no trust is declared, or only a trust as to part, there is a similar resulting trust in favour of the grantor as to the whole, or as to the residue, as the case may be, unless it can be made out that an actual gift was intended. See Act II of 1882, Ss. 81, 82. The presumption of advancement which arises in England when the purchase is in the name of a child, does not arise here in India, whether the purchase be in the name of a son, wife or a daughter. *Nobin Chunder v. Dokhobala* 10 Cal. 686. *Motirahu v. Purshotum* 6 Bom. L.R. 995.

Whether the nominal owner be a child or a stranger, a purchase made with the money of another is *prima facie* assumed to be made for the benefit of that other. *Pandit Ram Narain v. Maulvi Muhammad* 26 I.A. 38; 26 Cal. 227. *Naginbhai v. Abdulla* 6 Bom. 717: *Ashabai v. Haji Jyeh* 9 Bom. 115.

But the mere fact that the widow of a rich husband is found in possession of property of whose acquisition no account is given, raises no presumption that it belonged originally to her husband. *Diran Ran Bijai v. Inderpal Singh* 26 I.A. 226; 26 Cal. 871.

Such a transaction and allegations thereto will always be regarded with great suspicion, and strict proof must be given to prove it. But when the origin of the purchase money, and the fictitious character of the ownership is once made out, all subsequent acts may be explained, and when once a transaction is made out to be *benami*, courts will always give effect to the real and not to the nominal title, as is done in courts of equity in England.

As to the effect of such transaction upon third parties: it has been held that a third person, dealing with one, ostensibly in possession with the indicia of title, will not be prejudiced by the real owner subsequently turning up and setting up his title, and the equitable doctrine of "purchase for value without notice" will apply.

Moreover, cases occur where property has been passed benami with the express purpose of shielding it from creditors. In such a case, the law is, that the real owner may be allowed to obtain an adjudication upon the real nature of the transaction before the fraud is complete. But when once he has successfully defeated the claims of his creditors by this step, he will not be allowed to fall back upon his real position. *In pari delicto, potior est conditio possidentis*. *Ram Sarun Singh v. Mt. Pran Peary* 13 M.I.A. 551. *Puran v. Lalji* 1 All. 403; *Babaji v. Krishna* 18 Bom. 372. *Ravji v. Mahadeo* 22 Bom. 672.

And persons have been allowed to recover property which they had assigned away in order to defraud creditors, who in fact were never injured. *Sham Lall Mitra v. Amerandro Nath* 23 Cal. 460/474. *Kalicharan Pal v. Rasik Lal* 23 Cal. 962: *Honappa v. Narsapa* 23 Bom. 406.

And where a plaintiff sued for a declaration of his title to certain land which had been purchased by him in the Defendant's name, in order to conceal

his (he being a Government officer), name from the collector, it was held that he could obtain the declaration sought. *Lobo v. Britto* 21 Mad. 231.

Where a purchase is made benami, and a suit is brought by the benamidar in order that the real purchaser may escape the consequences to which the latter would be liable if he purchased and sued in his own name, the Court will look behind the record to see who the real purchaser is, and in this case where an agriculturist who purchased for a non-agriculturist sued in his own name, it was held that his non-agriculturist prncipal may take advantage of the transaction, on his paying the Court-fee stamp from which the agriculturists are exempted. *Dagdu v. Balwant Ramchándra Natu* 22 Bom. 820.

In suits by the benamidar, the question is whether any defence that he is such and therefore cannot succeed, may validly be raised. The decisions of courts are in conflict. In a case for possession of certain land by the benamidar the Calcutta High Court held that he could not succeed. as he has no real title to the land or possession of it. *Hari Gobind v. Akhoy kumar* 16 Cal. 364: *Issur Chandra v. Gopal Chandra* 25 Cal. 98: *Baroda Sundari v. Dinobandhu* Ibid. 874. A contrary decision was given by the Allahabad and the Bombay High Courts. *Nand Kishore v. Ahmad Ata* 18 All. 69 : *Raoji v. Mahadeo* 22 Bom. 672: *Dagdu v. Balwant Ibid* 820; *Yad Ram v. Umraosingh* 21 All 380.

In all these cases, it should be borne in mind, that the benamidar is a person whom the real owner. for purposes of his own. which are not necessarily fraudulent.has chosen to represent the estate to the public, and who is supplied with all the *indicia* of ownership to enable him to do so effectively. Therefore there is no reason why a wrong-doer or a person claiming adversely should be allowed to resist a claim by such a person on the ground of want of title or possession.

II. **The Second of the above rules is the *Law of Damdupat.*** *

This rule is a branch of the Hindu Law, and is stated in the Chapter on Debts. Under this the "interest exceeding the principal sum lent, can never be recovered at any one time." It is based on many Sanskrit Texts and judicial decisions acknowledging the authority of these texts. *Manu* Ch. VIII 151. *Yajnyavalkya* II 39. *Brihaspati*

* I have taken very recently a detailed survey of the origin, extent and applicability of this Rule. The following is a short summary of the same, to which if necessary, the learned reader is referred.

XI 13. *Gautama* XII 31. *Vishnu* and *Katyayana*. *Narayen v. Satwaji* 9 Bom. H.C. Ref. 83; *Dhondu v. Narayen* 1 Bom. H.C.R. 47.

The word principal in this rule is confined to the original principal alone, and does not mean the original principal together with the subsequent advances, whether (*a*) to the original person or (*b*) to different persons, and in the same or different transactions.

See Vijnaneshwara's commentary on Yajn. II 39; Manu Ch. VIII 154, 155. Vyawahara Mayukha.

**Further,** where payments are made from time to time, principal means the balance of the principal due at the time when accounts were last adjusted. *Dagdusa v. Rámchandra* 20 Bom. 613.

This does not forbid the capitalization of interest. So that, in the case of a bond purporting to be executed in adjustment of a past debt, the principal is the amount of such bond, and not the balance of the unpaid principal actually advanced or an earlier bond. *Suklal v. Bapu* 24 Bom. 305 and interest includes also the compound interest. *Gautama* XII 54 and 55.

This rule is not affected by the Laws of Limitation; and therefore, the mere fact that interest can be recovered for twelve years under the Limitation Act, will not preclude the courts from disallowing so much of the arrears as exceed the principal. *Ganpat v. Adarji* 3 Bom. 312: *Hari v. Balam bhat* 9 Bom. 233. And it has been held in Madras that this rule has been abrogated as regards mortgages governed by the Transfer of Property Act. *Madhara Sidhanta v. Venkata Ramanuja* 26 Mad. 662 to 671.

Its application (**A**) to transactions: and (**B**) to persons.

**A.** to transactions: The rule applies to pledges as also to mortgage transactions. *Yajnyavalkya* II 58, 64. *Nathubai v. Mulchand* 5 Bom. H.C.R. (A.C.J.) 196: *Narayan v. Satvaji* 9. B.H.C.R. 83.

But its application is limited to certain mortgage transactions and excluded in others. The rule *applies*. where the mortgagee receives the rents and profits in satisfaction of part or whole of interest; ( *Vithal v. Dawood* 6 Bom. H.C.R. 90: *Ali Saheb v. Sabji* 21 Bom. 85.) as also where he is *entitled* to receive the rents and profits without being liable to account for them. *Vasudeo v. Bhagwan* P.J., '73, P. 32.

The *rule does not apply* where there is a current account on both sides (*Gopal v. Gangaram* 20 Bom. 721 (**F.B.**): and even when there is a liability to account, and no accounts are kept. *Sundrabai v. Jayawant* 24 Bom. 114.

This rule does not apply to amounts recoverable in execution of the decree of a Civil Court *Balkrishna v. Gopal* 1 Bom. 73 it is made applicable only up to the date of the decree, after which the usual interest is allowed and assessed. *Shaha Kalidas v. Chudasama* P.J. (1895), 428.

An interesting point arose in Calcutta in this connection, viz.,—whether the rule of DAMDUPAT was applicable to amounts after the date of the decree; the facts of the case were, that a mortgagee having instituted a suit on his mortgage bond and obtained the usual decree, the Registrar was directed to take, as usual, an account of what was due to the mortgagee on his mortgage and to calculate in addition to what was already due on the mortgage, interest at 6 p. c. during the term allowed for redemption viz., 6 months. It was also provided that, at the expiry of that period the interest then due should be added to the principal sum, and that thereafter interest should be calculated at the rate of 6 p.c. The Registrar in his report found that, at the expiry of six months, there would be due to the mortgagee under the decree Rs. 12,000, for principal, and Rs. 11,534-0-3, for interest, making, in the aggregate, Rs. 23,534. The rule of DAMDUPAT was not then applicable, the interest found due being less than the principal sum. The report was confirmed by affluxion of time and the defendant's property being sold by the Receiver for Rs. 55,000 the plaintiff mortgagee claimed Rs. 23,534-0-3, with interest at 6 p.c. from the date of the Registrar's report. The defendant contended that plaintiff could not recover interest as it would be against the Hindu Rule of DAMDUPAT. The contention was disallowed by Sale J. and it was held that the rule would not apply, if it was not applicable at the time the decree became final and binding. *Lalla Behary Dutt v. Thackomony Dassee* 23 Cal. 899

Nor, according to a recent ruling in Madras, does this rule apply to mortgages under the Transfer of Property Act: and it does not affect the discretionary powers granted to Courts under S. 209 of the Civil Procedure Code. *Dhondshet v. Raoji* 22 Bom. 87.

**B.** As to persons: the rule applies only as between Hindus, where the debtor is a Hindu (*Nanchand v. Bapu* 3 Bom. 131) and for his benefit (*Dawood v. Wallubh 18 Bom. 227*). The original debtor must

be a Hindu: and a Hindu assignee from a Mahommedan debtor does not come within the rule *Harilal v. Nagar Jairam*, 21 Bom. 41 ; nor will a Mahommedan assignee protect himself under the original Hindu debtor *Ali Saheb v. Sabji 21 Bom. 85.*

This rule is a branch of the Hindu Law of Procedure and does not therefore determine the legality or illegality of any contract (Per. Wilson J. in *Ram Connoy v. Johur Lal Dut* 5 Cal 867). *Lastly* this rule is enforced only in the Courts of Bombay and the original side of Calcutta High Court and has been approved of and adopted by the Legislature in the Bombay Presidency. (Deccan Agriculturists' Relief Act. S. 13).

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QUESTIONS:—1 Explain the nature of a Benami transaction and illustrate by reference to the English doctrine of equity, how the relief is given in these cases. In what respects does it differ from the practice in the English courts of Chancery?

2. Within what limits will courts in India uphold the title of the real owner and when is his right barred? What isthe position of strangers dealing with benamidars.

3. Can the defence of want of title or possession be successfully set up against a benamidar?

4. Explain the Rule of Damdupat and ascertain its extent and applicability to transactions and persons. Can a non-Hindu claim the benefit of this rule by right of subrogation under his Hindu assignor?

# BOOK II.

## The Law of *Status*

OR

## Personal and Family relations.

***Note:***—Hindu Law, as is the case with every system of Law, treats of persons, property, and the combined relations of person and property.

I The first is treated of in the Law of STATUS or personal capacity.

II The Second by the Law of property and

III The third by a combination of the Laws of status and property viz. The Law of succession to the property of a person or a combination of persons by a person or combination of such.

These matters will be treated of in the three Parts next following.

# CHAPTER III.

## Marriage and sonship.

### I. Marriage.

***General remarks.***—If we ignore the records and chronicles of very ancient times, it will be seen that Marriage is an institution which is common to all societies ancient as well as modern, civilized as well as those that had yet to bring about a developement in their society. No doubt there are glimpses in the Mahabharata which point to a period when there might have been a promiscuity of intercourse between man and woman without any binding tie, and even in later periods exceptional instances of a special polyandrous form of marriage like that of DRAUPADI may be found, but these only go to prove conclusively the rule regarding the settled character which the intercourse between the sexes had assumed. There may be many varieties of details, e.g., one society may tolerate a plurality of husbands, and another that of wives, and there may be yet another which would entirely discard all unions when they are more than one husband or wife. But the fact that marriage as an institution is of a very ancient date is of universal application.

**Marriage under the Hindu Law.**—is a duty enjoined by the Shastras. It is purely a branch of the Law of status and has nothing to do with a contractual obligation. It is a sacrament under the Hindu system of law—one of the ten *Samskars* or purifying ceremonies, which are required "for removing the taint of seed and womb, and for complete regeneration."

एवमेनःशमं याति बीजगर्भसमुद्भवम् । ( *Yagnyavalkya I. 13*).

*N. B.* The Madras High Court, following the Smritichandrika has in two successive cases laid down that marriage is not a *Samskara* and therefore a father or a coparcener is not bound by a debt incurred for the marriage of a daughter or a male member. *Sundriammal v. Subramaniar* 26 Mad. 505. *Govindarajlu v. Deverabhatta* 27 Mad. 206.

But it would seem that in arriving at these decisions the Courts have discarded the Mitakshara doctrine expressly, without any reason beyond that there is no reason assigned for this proposition, and has laid down the above proposition apparently in pursuance of the wording of the Smritichandrika. The decision would not be the same if similar cases were to arise in other provinces.

**Forms of marriage:**—According to the texts, eight forms of marriages have been mentioned. These are:—"the Brâhma, Daiva, Ârsha Prâjâpatya, the Âsura, Gândharva, Râkshasa and the eighth and the basest is the Paisâcha." Manu III. 21.

ब्राम्हो दैवस्तथैवार्षः प्राजापत्यस्तथासुरः । गान्धर्वो राक्षसश्चैव पैशाचश्चाष्टमोऽधमः ॥ मनुः ३.२१.

The same **described.**

The **Brahma** (ब्राह्म:):—"The gift of a daughter, clothed only with a single robe, to a man learned in the Veda, whom her father voluntarily invites, and respectfully receives, is the nuptial rite called Brâhma" III 27.

आच्छाद्य चार्चयित्वा च श्रुतिशीलवते स्वयम् । आहूय दानं कन्याया ब्राह्मो धर्मः प्रकीर्तितः ३. २७.

The **Daiva** (दैव:):—"The right which sages call Daiva is the gift of a daughter whom her father has decked in gay attire when the sacrifice is already begun, to the officiating priest, who performs that act of religion." III 28.

यज्ञे तु वितते सम्यगृत्विजे कर्मकुर्वते । अलंकृत्य सुतादानं दैवं धर्मं प्रचक्षते ॥ मनुः ३. २८.

The **Ârsha** (आर्ष:):—"When the father gives his daughter away, having received from the bridegroom one pair of kine or two, for uses prescribed by law, that marriage is termed Ârsha. III 29.

एकं गोमिथुनं द्वे वा वरादादाय धर्मतः । कन्याप्रदानं विधिवदार्षो धर्मः स उच्यते ॥ ३. २९.

The **Prâjâpatya** (प्राजापत्य:):—When the father gives away his daughter with due honour, saying distinctly, "May both of you perform together your civil and religious duties". III 30.

सह नौ चरतां धर्ममिति वाचानुभाष्य च । कन्याप्रदानमभ्यर्च्य प्राजापत्यो विधिः स्मृतः ॥ ३. ३०.

The **Âsura** (आसुर:):—"When the bridegroom, having given as much wealth as he can afford, to the father and paternal kinsmen, and to the damsel herself, takes her voluntarily as his bride, that marriage is named *Âsura*" III 31.

ज्ञातिभ्यो द्रविणं दत्वा कन्यायै चैव शक्तितः । कन्याप्रदानं स्वाच्छन्द्यादासुरो धर्म उच्यते ॥ ३. ३१.

The **Gândharva** (गान्धर्व:):—"The reciprocal connection of a youth and a damsel with mutual desire, is the marriage denominated *Gândharva*, contracted for the purpose of amorous embraces, and proceeding from sensual inclination." III 32.

इच्छयान्योन्यसंयोगः कन्यायाश्च वरस्य च । गान्धर्वः स तु विज्ञेयो मैथुन्यः कामसंभवः ॥३.३२.

The **Râkshasa.**—(राक्षसः):—The seizure of a maiden by force from her house, while she weeps and calls for assistance, after her kinsmen and friends have been slain in battle or wounded, and their houses broken open, is the marriage called *Râkshasa.*

हत्वा छित्वा च भित्वा च क्रोशन्तीं रुदतीं गृहात् । प्रसह्य कन्याहरणं राक्षसो विधिरुच्यते ॥३.३३.

The **Paisâcha**—(पैशाचः):—"When the lover secretly embraces the damsel, either sleeping or flushed with strong liquor, or disordered in her intellect, that sinful marriage, called *Paisâcha*, is the eighth and the basest.,' III 34.

सुप्तां मत्तां प्रमत्तां च (v.l. वा) रहो यत्रोपगच्छति । स पापिष्ठो विवाहानां पैशाचश्चाष्टमोऽधमः ॥ ३. ३४.

It will be seen from the above description of the several forms of marriages, that they represent different evolutionery stages in the development of this institution in the Âryan societies.

Of these, the first four are called *approved*, and the last four *unapproved* forms. The *Brâhma* form alone prevails in the higher classes. But looking to the practice of marriages in vogue, it cannot be said that this form alone is prevalent. It is generally stated that the Brâhma is the only legal form at present in use, and probably this may be so among the higher classes. But there is no doubt, that the *Âsura* is still practised, and in Southern India among the Sudras, it is a very common, if not the prevailing form. Even between Brahmins such a marriage has been held valid in Madras. *Visvanathan v. Saminathan* 13 Mad. 83.

And in Bombay it has been held that, among the lower classes, the presumption is that marriage is celebrated in the Âsura form; *Vijayarangam v. Lakshman* 8 Bom. H. C. R. 144. Though higher forms are not forbidden among them. *Jaikissendas v. Harikisen.* 2 Bom. 9.

*Note.—Palla*, as generally understood, consists of money and goods intended for the future use of the bride in the nature of the pin-money; and the mere circumstance that it is received by the bride's father or relatives does not constitute a sale of the bride, such as is characteristic of the Âsura form of marriage. *Amratlal v. Bapubhai*, '87, P. J. Bom.

11. C. 207. The validity of the *Gándharva* marriage between *Kshatriyas* appears to have been declared by the Bengal Sudder Court in 1817, and has been assumed in 1850, and in 1853. But this form of marriage is very rare, and the Allahabad High Court has declared it as nothing more or less than an established concubinage. *Bhaoni v. Maharaj Singh.* 3 All: 738.

And it has been held in Madras, that it would be legal only when celebrated with nuptial fires, of which the *homam* ceremony is an essential part. *Binduman v. Radhamani* 12 Mad. 72. In Bombay, such a marriage between a Rajput and Brahmin girl was not upheld, and the suit for restitution of conjugal rights based thereon, was thrown out. *Lakshmi v. Kalliansing.* 2 Bom. L. R. 128.

**Presumptions as to marriage.**—[1] In the absence of evidence to the contrary, a marriage among the higher classes, will always be presumed to be in an *approved* form, and the burden of proving to the contrary will always lie on those who assert otherwise. *Thakur Deybee v. Rai Baluk Ram.* 11. M I. A. 139. *Gojabai v. Shahajirao Maloji Raye Bhosle.* 17 Bom. 114. *Jagannath Prasad v. Ranjit Singh.* 25 Bom. 354/366.

[**1.A.**] As to ceremonies:—If there is sufficient evidence to prove the performance of some of the ceremonies usually observed at a marriage, a presumption is always to be drawn that they were fully completed until the contrary is shown. *Brindaban Chandra v. Chandra Kurmakar.* 12 Cal. 140; *Inderun v. Ramasawmy* 13 M I. A. 141 and *Bai Diwali v. Moti Carson* 22 Bom. 509/512.

[**2**] "When a particular relationship, *e.g.*, a marriage, is shown to exist, its continuance must be presumed, and the burden of proving dissolution lies upon those who assert it." Per Jenkins C.J. in *Bhima v. Dhulappa* 7 Bom. L.R. 95.

[**3**] As to paternity, under the Indian Evidence Act, "the fact that any person was born, during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof, that he is the legitimate son of that man, unless it can be shown that the parties had no access to each other at any time when he could have been begotten." S. 112.

And where a wife came to her husband's house a few days before he died, and remained there up to the time of his death, and it was shown that a child alleged to be that of the husband, was the child of the wife, and that it was born within the time necessary under S. 112, the Privy Council, in the absence of any evidence to show that the husband could not have had connection with his wife during the time she was residing with him, held, that the presumption as to paternity must prevail, and the fact that the husband was, during such a period, suffering from a serious illness which terminated fatally shortly afterwards, was held, under the circumstances, not sufficient to rebut the presumption. *Narendra Nath Pahari v. Ram Gobind P.* 29 Cal. 111 S.C. 29 I.A. 17.

This presumption as to paternity only arises in connection with the offspring of a married couple, and a person claiming as an illegitimate son must establish his alleged paternity in the same manner as any other disputed question of relationship is established. *Gopalasami Chetti v. ArunachalamChetti* 27 Mad. 32/34 and 35.

But where a *de-facto* marriage has once been established and supported by the deceased's recognition of his children, the very strongest evidence will be required to show that the law denied to such children their presumable legal status on the ground of their mother's incapacity to contract a marriage. *Ramamani Ammal v. Kulanthai Nauchiar* 14 M.I.A. 346.

***Parties to the marriage:***—This subject would resolve itself into *two branches* **A.** *General requisites* for a legally valid marriage.

**B.** *Competency of parties* to the marriage.

**A.** ***General conditions:***—Two principal tests must invariably be satisfied. (1). The parties to a marriage must belong to the same caste.

(2). ,, ,, ,, must not be of the same family.

The conditions have been summed up by *Yajnyavalkya* as follows:—

अविप्लुतब्रह्मचर्यो लक्षण्यां स्त्रियमुद्वहेत् । अनन्यपूर्विकां कान्तां असपिण्डां यवीयसीम् ॥
अरोगिणीं भ्रातृमतीमसमानार्षगोत्रजां । याज्ञवल्क्यः । १. ५२-५३.

*Translation.*—(The bridegroom) who has not swerved from the vow of celibacy, should take to wife, a woman possessed of (good) qualities; she must also be one who is unappropriated by another, who is lovely, who is not a *sapinda* (within the prohibited degrees of relationship), is younger than himself, is free from all disease, has brothers, and is not born of the same ancestors, nor of the same family."

**Conditions of eligibility for marriage.**

[1] The girl to be taken in marriage must be of the same caste.

But a local custom may sanction intermarriages between members of different castes among the Sudras. *Melaram Nudial v. Tanuram Bamun.* 9 W.R. 552. *Inderun v. Ramaswamy* 2 P.C.R. 267 also 15 Cal. 708.

According to the Lingayat religion, as well as according to the Hindu Law, marriage between different sects of the Lingayeots are not illegal, and where it is alleged that such a marriage is invalid, the *onus* lies upon the persons making such allegation, of proving that such marriage is prohibited by immemorial custom. *Fakirgauda v. Gangi* 22 Bom. 277.

[2] The girl must be younger in age. A girl of any age may be taken, though great sin is incurred by marrying with a girl of the age of maturity.

[3] Widows may now be taken in marriage under Act XV of 1856.

[4] The marriage of a woman whose husband is living is absolutely prohibited: and is punishable under S. 494 I. P. C. and it was held in Bombay, that a caste custom which permitted a woman, in the lifetime of her husband, to contract a second marriage, *without his consent* is invalid and the woman and the man are respectively punishable under Ss. 494 and 497 I. P. C. respectively. *Reg. v. Karsan Goja* 2 Bom. H. C. R. 117.

In certain cases a married woman may marry again with the permission of her first husband. *Emp.* v. *Umi* 6 Bom. 126. A custom authorizing a *natra* marriage without a divorce, on payment of a certain sum to the caste is immoral. *Uji v. Hathi Lala* 7 Bom. H. C. R. 133.

*N. B.* There is nothing immoral, however, in a divorce and remarriage being permissible, under a caste custom on mutual agreement, on one party paying to the other the expenses of the latter's first marriage. *Sankaralingam Chetty* v. *Subban Chetty* 17 Mad. 479. See also *Chinnammal* v. *Varadarajulu* 15 Mad. 307.

[5] A betrothed girl may be taken in marriage.

[6] *Marriage by exchange* is prohibited by the Shastars. But such marriages are allowed, if a custom to that effect is satisfactorily proved to have existed. Such a custom and a conditional marriage

based upon that custom, in the Kudwa Kunbi caste, was allowed in Bombay. *Bai Ugri* v. *Patel Purshottam Budha* 17 Bom. 400.

[7] **Marriage within prohibited degrees** is forbidden in Hindu Law. This is based on the following:—

असपिण्डा च मातुरसगोत्रा च या पितुः। सा प्रशस्ता द्विजातीनां दारकर्मणि मैथुने।

"For the nuptial and holy union of a twice-born man she is eligible, (1) Who is not the daughter of one who is of the same *Gotra* (2) and who is not a *Sapinda* with the bridegroom's father or maternal grandfather". Manu III. 5. This text applies only to the twice-born.

As to the *sudrâs* see the following from the *Bhavishya-Purâna.*

समानगोत्रप्रवरां शूद्रामुद्या नदोषभाक्। शूद्रः स्याच्छूद्र जातौ च सपिण्डे दोषभाग्भवेत्॥

"A *sudra* incurs no sin by marrying a girl of the same *Gotra* and *Pravara*; but he becomes blameworthy by marrying a *Sapinda girl*".

**The Sapinda relationship and the prohibited degrees of relationship:—**

पंचमात्सप्तमादूर्ध्वं मातृतः पितृत. क्रमात्। सपिंडतानिवर्तेत सर्ववर्णेष्वयंविधिः॥

"It is a general rule applicable to all castes, that the *Sapinda* relaionship ceases after the fifth and seventh degree from the mother and the father respectively".

According to *Vignaneshwara's* interpretation, the text which declares that *sapinda* relationship ceases after the seventh and fifth degree, does not define the term, but only cuts short its denotation: In his commentary upon Yajn I. 52, he observes "Sapinda relationship arises between two people through their being connected by particles of the same body, mediately or immediately." etc. See also the observation, of अपरार्क from which it is clear, that the seventh and fifth dgrees include in computation the father and the mother; on the mother's side, the computation should proceed as, mother, mother's father, &c. and on the father's side similarly. A marriage, however, within these degrees, is not necessarily invalid, and may invoke the application of the doctrine of *factum valet.* The parties may atone for the transgression by observing the *Chandrayana prayaschitta.* In actual practice, a girl of the same *Gotra* can never be married, but the Sapinda relationship is cut down to three on the mother's, and five on the father's side. This limit is strictly observed.

A man given in adoption cannot marry a *sapinda* or a *sagotra* girl on the side of his natural or adoptive parents. The artificial tie of adoption does not obliterate the natural one of affinity.

In this connection (prohibited degrees etc.) the following couplet may be noted of बृहस्पति.

मातुः स्वसा मातुलानी पितृव्यस्त्री पितृष्वसा । श्वश्रूः पूर्वजपत्नी च मातृतुल्याः प्रकीर्तिताः ॥

*i.e.* "the mother's sister, the maternal and paternal uncle's wife, the father's sister, the mother-in-law, and the wife of an elder brother, are pronounced equal to mother."

**Effect of such a marriage:**—is that it is absolutely void except where sanctioned by a special custom, in which case, when once the custom is established, the marriage is looked upon as valid and a presumption arises as to its legality. See *Lachman Kuar v. Mardan Sing* 8 All. 143. In the Bombay Presidency, on the side of Akola and also in Sholapore and other places, it is not objectionable to marry a maternal uncle's daughter: and the nickname (बायको *i.e.*, wife) given to such a relative, is indicative of the actual practice. There are also cases where by custom the daughters of maternal and paternal aunts are taken in marriage.

[8] **Marriage between persons of different castes** are obsolete now; and Yajnavalkya expressly condemns such marriages, with a reason as follows:—"As for the proposition that is stated about the marrying of *sudra* wives by the twice-born, it is not acceptable to me: since one's self is born there (in a wife)" I 56.

यदुच्यते द्विजातीनां शूद्राद्दारोपसंग्रहः । नैतन्मम मतं यस्मात्तत्राऽऽत्माजायते स्वयम् ॥
[आचाराध्याये । ५६

Compare also to the same effect Manu Ch. III 14 I. 15. 17.

There are, however, elaborate provisions in the texts, laying down the order of procedure among the wives and their progeny, of persons belonging to different castes.

But, there is nothing to prevent marriage between different sections of the same caste and though there were earlier rulings requiring special custom for proving the validity of such marriages (*Meluram v. Thanooram* 9 W.R. 552; *Narain v. Rakhal Gain* 1 Cal. 1) it has been held that there is nothing in Hindu Law prohibiting marriages between persons belonging to different sections or subdivisions of the sudra caste: *Upoma Kuchain v. Bholaram Dhubi* 15 Cal. 708 and in *Fakirgauda v. Gangi* 22 Bom. 277 (*ubisupra*) the Bombay

High Court presumed the validity of such a marriage among the sub-sects of the Lingayat caste and required their invalidity to be proved.

**Who may Marry:—**
*(a)* **Bridegroom.**

[1] Minors: the general inclination of the written authorities is that a man should not marry before the completion of his 24th birth day. But there is no text which expressly lays down that a minor cannot lawfully marry. Marriage being one of the matters not affected by the Indian Majority Act, Majority for this purpose is attained on the completion of the 16th year, and consent of a guardian is necessary for a marriage of a boy under that age. *Nundlal v. Tapudas* 1 Mor. 287.

[**2**] Idiots and Lunatics though disqualified for civil purposes, are yet competant to marry *Dahee Charan Mitra v. Radha Charan Mitra* 2 Mor. 99. The lunatic or idiot may be incapable of inheriting, but his issue would receive their shares. *Ibid.*

And generally, a Hindu Marriage is the performance of a religious duty, and therefore, the consenting mind is not necessary, and its absence, whether from infancy or incapacity, is immaterial. (Mayne P. 106 and authorities there cited.)

[**3**] Deaf or dumb persons, or persons affected with a loathsome disease, cannot go through the ceremony of marriage, though if a girl is actually given, it may not be held void. Such persons cannot enforce the restitution of conjugal rights. *Bai Prem Bhukar v. Bhikhu Kallianji* 5 Bom. 209.

[**4**] One whose wife is living may marrry a second wife or even a widow.

But, according to the Progressive Brahmo Faith, the marriage of a person having an already existing wife, with another woman is not legal. *Sona Luxmi v. Vishnu Prasad*, 6 Bom. L.R. 58.

[**5**] A widower may marry and in certain cases the *Sastras* enjoin marriage upon him.

[**6**] A man while in mourning may not go through the cermoney of marriage.

(*b*) **Bride:**—[**1**] One who has not once gone through the *ceremony* of marriage, may marry.

[2] **Second marriages and divorce:**—It has been seen that polygamy is allowed by the shastras, and that polyandry is not. Second marriages appear to be prohibited by some texts; but this prohibition has no foundation either in early law or custom. Manu no doubt declares that "a man may not marry again." But according to Mr. Mayne, this probably is an interpolation. However this may be, the general trend of all the authorities is against such marriages, as usual, and wherever they are allowed, they are so, as exceptions and not rules. The texts upon these are merely permissive and not mandatory.

It has been laid down that divorce is not allowed in the three regenerate classes and also in the higher community of the Sudras. Among the higher classes, divorce and remarriages are practically unknown, though the modern Reform Movement is adding exceptions to this rule every year.

A re-marriage between a *Khatri* and a *Khatrani* widow is legal. *Nathu v. Ram Dass*, 4 Punj. Rec. (1905).

It has been held in Bombay that the right of divorce and remarriage exists among the Sudras. *Rahi v. Govinda*, 1 Bom. 197.

**Commencement and continuance of the relationship:**— The relationship of husband and wife begins after the completion of the marriage and this happens when the last of the seven steps (*saptapadi*) has been completed by the pair.

**Betrothal:**—An agreement to give or take in marriage is what is known as betrothal. It is not the marriage itself, which is a completed transaction and is never revocable: while betrothal is. *Umed v. Nagindas*, 7 Bom. 122.

And a suit would not be for its specific performance. (*In the matter of Ganpat Sing* 1 Cal. 174): the only remedy is by an action for damages. *Ibid.* But a suit for damages may be brought on a contract of betrothment where it is a fair and legal one, and where the breach of it is not for a justifiable cause. *Mulji v. Gomti* 11 Bom. 412.

All expenses resulting from the abortive contract would be recoverable in such an action. *Mulji Thackersey v. Gomti*, 11 Bom. 412. *Rambhat v. Timmayya*, 16 Bom. 673.

And it was held in *Purushottamdas Tribhowandas v. Purshottamdas Mangaldas*, 21 Bom. 23, that where the plaintiff, who had been betrothed to Defendant's daughter, sued for a declaration that unless the defendant was willing that the marriage should be performed before the expiration of a certain period, the contract for marriage should be no

longer binding on plaintiff, and that the betrothal was void, it was held that Plaintiff was entitled to the declaration prayed for. The Court observed that "the marriage of Hindu Children is a contract made by the parents and the children themselves exercised no volition. This is equally true of betrothal and there is no implied condition that the fulfilment of the contract depends upon the willingness of the girl at the time of the marriage".

**Other Contracts relating to marriage.**

(2) **Contract for giving presents:**—are apparently against public policy, and are therefore void, though, according to the Madras High Court such contention would not be well grounded.

Among the lower castes, the father of the bride is allowed to take presents from the bridegroom: and the latter is entitled to a restoration of these on the former's giving the girl away in marriage to another person. *Râm Chandra Sen v. Audit Sen* 10 Cal. 1054. *Rambhat v. Timmayya*, 16 Bom. 613.

In a recent case in Madras, where the parties were Brahmins, it was held that a father might lawfully sue on a bond executed in his favour, in consideration of his having given his daughter in marriage to Defendant's brother's son: The Court said:—"the paucity of decisions is in favour of the contention that the moral consciousness of the people is not opposed to the practice". *Visvanathan v. Saminathan*, 13, Mad. 83.

Looking to the general sentiment prevailing in the Hindu Society, such contracts are looked upon with utmost disfavour, and are generally entered into and carried out in secret. Contracts **in restraint of marriage** and **marriage brocage contracts** are void under the Indian Contract Act:

A stranger having a minor girl under his guardianship, cannot bring a suit on a contract by which, in consideration of his giving the girl in marriage, the bridegroom promised to him a gratuity. *Dulari v. Vallabhdas Pragji*, 13 Bom. 126. *Pitambar Ratansey v. Jugjivan*, 13 Bom. 131.

The Madras view in 13 Mad. 83 has been considerably modified by the later decision of *Vaithyanathan v. Gangaraju*, 17 Mad. 9, where an agreement to assist a Hindu for reward in procuring a wife was held void as being contrary to public policy, under the Indian Contract Act 23.

"It has been very recently held in Bombay that a contract, which entitles a father to be paid money, in consideration of giving his son or

daughter in marriage, is against public policy, and cannot be enforced in a Court of Law. *Dholidas Ishwar v. Fulchand Chhagan*, 22 Bom. 658.

***Guardianship in Marriage:—***

This may be (A) **Before** or (B) **After,** marriage.

**A. Before: Power to dispose of a girl.** In a Hindu marriage, the bride is not regarded as an active party. She is looked upon as the subject of the gift by her father, or guardian, or other near relative. The order in which persons are entitled to possess this right is thus given by *Yajnavalkya.* I. 64.

पिता पितामहो भ्राता सकुल्यो जननी तथा । कन्याप्रदः पूर्वनाशे प्रकृतिस्थः परःपरः

"The father, paternal grandfather, brother, (paternal) kinsman, and mother: all these are in order (competent) to give a damsel when in (right) condition." This duty of giving a damsel away is enjoined by the Shastras and accordingly the damsel is asked to wait, and if within a reasonable time, the guardian would not arrange for her marriage, she should go to the king and invoke his help: failing that, she should make her own choice. See Manu IX, 89, 90 and 91, and Yajnavalkya I. 64 and Vignâneshwara's comments.

It will be seen that the order of guardianship differs from that for other purposes. A very inferior position is assigned to the mother; and so in the case of *Jânki Pershad Agarwala*, 2 Boulnoi's 114, a brother was allowed preference over a mother in giving a girl away in marriage.

The Madras High Court has, however, in a later case, so interpreted the text as to recognize the natural right of the mother to some extent. They have proceeded upon the line, that the mother's choice would be upheld if it is found as a fact that that choice is by far the most preferable among the lot. *Namasivayam Pillay v. Annami Ammal*, 4 Mad. H. C. R. 344.

**Temporary relief by Courts.** Where the guardian is about to effect a marriage which is obviously injurious to the girl, the court has power to interfere, especially where his conduct is influenced by improper or interested motives. *Shridhar v. Hiralal*, 12 Bom. 480. *Nanabhai v. Janardhan Vasudeo*, 12 Bom. 110: *Harendra Nath v. Bindu Rani*. 2 Cal. W. N. 521.

But such interference by courts will be in very extreme cases, when the guardian is the father of the minor. *Shridhar v. Hiralal*, 12 Bom. 480.

**Marriage is a Duty under the Shastras:**—So much so that even the brothers are asked to get their sisters married and for these purposes a share has to be kept. See Yajnavalkya II. 124, and the gloss of *Vijnaneshwara* thereon, see also other texts referred to in *Apararka*, also the case of *Vaikuntam Ammangar v. Kallabiran Ayyangar*, 23 Mad. 512 and 26 Mad. 497.

But the same court has recently held that marriage is neither a religious nor a legal duty; and therefore in a suit by a wife to recover the expenses for the marriage of her daughter, against the husband, it was held that he was not liable. *Sundari Ammal v. Subramaniya Ayyar*, 26 Mad. 303; and very recently the same doctrine was laid down with reference to the marriage of a male member. 27 Mad. 207 (*ubi supra*).

But it would seem that this would not hold in Bombay and other places where the *Mitakshará* has special and general application. See in addition the following references:—Celebrooke's Digest of Vol II. Page 294, CXX, P. 295, CXXI 299; Stokes Hindu Law books P. 46, 57.

**B. After marriage:**—the husband is the guardian of his wife unless by special custom this right of his is postponed till the wife attains puberty. *Arumuga Mudali v. Viraragava Mudali*, 24 Mad. 255.

**Doctrine of *factum valet* in marriage.** Though the guardian has the sole right of disposing of a girl in marriage, the institution of marriage being a branch of the law of status, which once conferred, cannot be changed by act of parties, the courts have applied the doctrine of *factum valet* in these cases and have upheld the marriages although brought about without the consent of the guardian.

Under the Hindu Law, a duly solemnized marriage cannot be set aside, in the absence of fraud or force, on the ground that the father did not give his consent to the marriage. The texts relating to the eligibility of persons who can claim the right of giving a girl in marriage are directory, and not mandatory. *Mulchand v. Bhudia*, 22 Bom. 812. *Khushal Chand v. Bai mani*, 11 Bom 247; *Ghazi v. Sakru*, 19 All. 515. *Namasevayan Pillai v. Annami Ammal*, 4 Mad 339; *Mudoosoodun Mookerji v. Jadub Chandur Bannerji*, 3 W. R. 194.

And in Bombay in *Bai Diwali v. Moti* 22 Bom. 509 the court has upheld a marriage which was in violation of the orders of the court, and of the preferable right of the uncle over the mother, whohad given away her daughter in marriage. The judges also held in this case that a presumption should always be drawn in favour of a lawful marriage, (unless the contrary is proved), when the evidence sufficiently establishes the fact that ceremonies were performed.

But note that though the maraiage be upheld, still persons abetting the removal, and removing the girl from proper custody, would be liable criminally under the Indian Penal Code as principal and abettors *Q. v. Goverdhan Rajbunsee*, 4 W.R. 7 (Cr.): *Emp. v. Pran Krishna Sharma*, 8 Cal. 969.

## Conjugal rights and duties.

**Custody of wife:**—*Prima facie*, the husband is the legal guardian of his wife and is entitled to require her to live in his house from the, moment of the marriage, however young she may be, unless by custom such period is postponed. *Re Dharmidhar Ghose*, 17 Cal. 298: *Arumuga Mudali v. Viraraghava Mudali*, 24 Mad. 255.

" Where the wife is *sui juris*, and refuses to live with her husband he can keep her by force......*Manu* IV 83.

But a suit will not lie for her recovery, when she is adult; the court can only order the wife to go to her husband's house. *Yamunabai v. Narayen Moreshwar Pendshe*, 1 Bom. 164.

**Mutual rights and remedies:**—The parties have the right to bring a suit for restitution of conjugal rights, if either of them refuses to live with the other, after the completion of the marriage.

The duty imposed upon a Hindu wife to reside with her husband, wherever he may choose to reside, is a rule of Hindu Law, and not only merely a moral duty; and an ante nuptial agreement on the part of the husband that he will never be at liberty to remove his wife from her parental abode, would defeat the rules of Hindu Law, and is invalid on that ground, as well as the grouud that it is opposed to public policy. *Tekait Mon Mohini Jamadai v. Basanta Kumar Singh*, 28 Cal. 751.

**Circumstances justifiying wife's refusal to live with her husband:**—

1. CRUELTY:—The criterion of cruelty is the same here in this country as in England. Actual violence endangering personal safety or

causing a reasonable apprehension of it, must be proved. *Moonshee Buzloor Rahim v. Shumsooinnissa*, 11 M.I.A. 551. *Yamunabai v. Narayan*, 1 Bom. 164. *Matangini Gupta v. Jogesh Chandra*, 19 Cal. 84.

2. MISCONDUCT:—*e.g.*, keeping a Mahomedan mistress. *Lala Govind v. Dowlat*, 14 W.R. 451. The case would be otherwise if he discards his mistress and then sues. *Paigi v. Sheo Narain*, 8 All. 78.

3. CHANGE OF RELIGION:—is another circumstance under which a wife is excused from living with her husband, *Monsha Levi v. Jiwanmal*, 6 All. 617.

3 A. LOSS OF CASTE:— is no defence to such a suit and the decree cannot be made conditioned or plaintiff's being restored to caste. To bar such a suit some offence of a matrimonial nature must be set up and proved. *Binda v. Kaunsilia*, 13 All. 126 followed. *Sahadur v. Rajwanta*, 27 All. 96.

4. LOATHSOME DISEASES, IMPOTENCY &c.:—Manu says that a wife is not bound to live with a husband who is impotent or suffering from some loathsome disease. Accordingly the Bombay High Court refused to decree restitution of conjugal rights in favour of a husband who was suffering from Leprosy and Syphilis. *Bai Prem Kuar v. Bhika Kallianji*, 5 Bom. 209. But the mere fact that the wife (Defendant), from illness or otherwise (in this case, physical malformation) is unfit for conjugal intercourse, is no defence to such a suit; though such a defect in the complainant would *prima facie* be a bar to such a suit. *Purushottamdas v. Bai mani*, 21 Bom. 610.

5. INTELLECTUAL WEAKNESS:—On the part of the husband does not justify desertion by the wife. *Binda v. Kausillah*, 13 All. 126 *Dadaji v. Rukhmabai*, 10 Bom. 301.

6. ILLEGALITY OF THE MARRIAGE itself would be a good defence. A Rajput husband suing his Brahmin wife by *Gandharva* marriage for restitution of conjugal rights, was not allowed his claim, as such marriages are not allowed. *Lakshmi v. Kalliansing*, 2 Bom. L.R. 128.

## Effect of Marriage on Personal Property.

**Contracts by married women**:—A Hindu married woman as such is, under the Indian Contract Act, not incompetent to contract, if not otherwise disqualified. *Nathu Bhai v. Jarher Raiji*, 1 Bom. 121. As regards her debts, it has been held that where she contracts jointly with her husband, she is liable only to the extent of her Stridhan, and not personally. *Narotam v. Nanka*, 6 Bom. 473; 12 Bom. 228. But a Hindu widow is personally liable for debts

contracted during widowhood, even though she has re-married. *Nahalchand v. Bai Shiva*, 6 Bom. 470. Where a husband and wife live together, the presumption is that she was acting as the agent of the husband. *Virasswamy Chetti v. Appaswamy Chetti*, 1 Mad. 375. But a wife who has voluntarily separated herself from her husband without any justification, is liable for debts contracted, even for necessaries, to the extent of her Stridhan. *Nathu v. Jarher*, 1 Bom. 121. She is never personally liable. *See* S. 245 A. Civil Procedure Code.

**Husband's liability:**—A Hindu husband is not liable for debts contracted without his authority, and where no necessity is shown for presuming such authority. *Pusi v. Mahadev Prasad*, 3 All.122. *Girdhari v. Crawfood*, 9 All. 147. So also is a husband not bound to pay his wife's debts even for necessaries, when she leaves his house on account of his taking a second wife. *Virasami v. Appasami*, 1 Mad. 375.

**Rights of husband and wife in each others, property:**— A wife acquires no right whatever in her husband's property; nor does a husband acquire any right in the *Stridhen* property of his wife. In times of distress he is entitled to such property, though he is bound to compensate her, or to restore the property as soon as his circumstances permit.

दूर्भिक्षे धर्मकार्मे च व्याधौ संप्रतिरोधके । गृहीतं स्त्रीधनं भर्ता न स्त्रियै दातुमर्हति II. 147.

But वृथा दानेच भोगेच स्त्रियै दद्यात्सवृद्धिकं

Exception पुत्रार्ति हरणे वामि स्त्रीधनं भोक्तुमर्हति

As प्राप्तं शिल्पैस्तु यद्वित्तं प्रीत्याचैव यदन्यतः ।

भर्तुःस्वाम्यं भवेत्तत्र शेषंतुस्त्रिधनं स्मृतम् ॥ कात्यायनः।

"The wealth obtained by (skilful) arts as well as that from others out of affection, becomes subject to the husband's ownership: the rest is known as Stridhen."

**Marriage Customs:**—Which are immoral, illegal or opposed to public policy *e.g.*, authorizing a woman to abandon her husband and marry again without his consent, will not be upheld by courts (see Mayne P. 63 and cases cited), and it was doubted whether a custom authorising her to marry again during his life-time without his consent would be valid. *Khemkor v. Umiashankar*, 10 Bom. H.C.R. 381. There is, however, nothing immoral in a custom by which divorce and remarriage are permissible by mutual agreement on payment by one party to the other, of the expenses of the original marriage. *Sankaralingam Chetty v. Suban Chetty*, 17 Mad. 479. See also 24 Mad. 255.

the custom of wife's remaining with her father till puberty.

The custom of *Sarwaswadhanam Marriage* still exist among the Nambudri Brahmins of the Malabar Coast in Madras. Where a Nambudri has no male issue he may give his daughter in *Sarwaswadhanam* marriage. The result of such a marriage is, that if a son is born, he inherits to, and is for all purposes the son of, his father-in-law. On failure or in the absence of male issue, the property of the wife's father does not belong to the husband, but reverts to the family of the father-in-law, (*Wasuderan v. Secretary of state*, 11 Mad. 157, 160: *Kumaran v. Narayanan* 9 Mad. 260.) unless the marriage has been accompanied by a formal appointment of the son-in-law as heir to the Illom.—*Mayne*.

EXAMINATION: SHORT SUMMARY:—Marriage is a very old institution and may be found among all societies. Uunder the Hindu Law it is a duty enjoined by the Shastras and is one of the ten samskaras. There were eight *forms* of marriage Viz. Brähma, Daiva, Ârsha, Prajapatya, Âsura, Gandharva, Rakshasa, and Paishacha. These may be shortly remembered with the help of the following lines.

ब्राह्मे विवाह आहूय दीयते शक्त्यलंकृता । यज्ञस्यऋत्विजेदैव आदायार्षस्तु गोद्वयम् ।
इत्युक्त्वा " चरतां धर्मं सह " या दीयतेऽर्थिने (स प्राजापत्यः)
आसुरोद्रविणादानाद्गान्धर्वः समयान्मिथः । राक्षसोयुद्धहरणात्पैशाचः कन्यकाछलात ॥

Yajnavalkya. I. 58—61.

Of these, only two, the *Brâhma* and the *Asura* remain. The four *presumptions* as to marriage are that unless otherwise proved, it will be presumed to have taken place in an approved form among the higher classes, the ceremonies will be presumed to have been duly performed, when once its performance is established, continuance will be presumed until dissolution is proved and children born during its continuance will be presumed to be legitimate. The *parties* to the *marriage* must be inside the caste and outside the family. The girl must be younger, must not have a husband living and must not be within the prohibited degrees of relationship. (N.B.) For this purpose three degrees on the mother's and five on father's side will be regarded as prohibited. Marriages between persons of different castes are obsolete. But there is no objection to a union between different sects of the same caste. There is no restriction as such on account of incapacity of mind or body *e.g.* Minority lunacy, deafness, or other disease. Of the *contracts relating to marriage*, betrothal is chiefly to be noted and distinguished from marriage itself, which means a completed marriage. The persons entitled to give away a girl in

marriage are father, his father, son, paternal relations and mother. But these may change according to circumstances. The husband has a right to the custody of his wife after and during marriage unless postponed by custom. Other customs in derogation of this right will not be upheld as immoral. The Doctrine of *factem valet* applies to this branch of Hindu Law as under it, "once a marriage always a marriage." Both are entitled to enforce conjugal rights, except when, cruelty, misconduct, change of religion or loathsome disease, may be successfully set up. As a general rule, a married woman will not be liable personally, but her Stridhan property will be held liable, except when in cases of necessity her acts will bind her husband. There is no absolute presumption in this case. The husband may use his wife's property, but is liable to give it back with interest, except when it was used in times of distress, or for a pious or religious purpose or for removing the troubles of the son.

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QUESTIONS:—(1) Enumerate and describe briefly, the chief forms of marriage? Which of those are now prevalent? Can a Rajput enforce his rights as a husband against a *Brahman* woman under a gandharva marrriage?

(2) State briefly the presumptions as to marriage and discuss them briefly with special reference to decided cases: can an illegitimate child claim the benefit of these presumptions?

(3) Enumerate briefly the conditions of eligibility for a marriage? What is a *Sapinda* relationship? Can a maternal uncle's daughter be eligible as a wife under Hindu Law? How far intermarriages are allowed under Hindu Law? What are the limitations upon a Hindu's power of divorce? Are remarriages allowed? Discuss fully.

(4) State some of the contracts relating to marriage. Describe a "*Betrothal*". What are the rights and remedies open to a person affected by a breach of these?

(5) What are the rights and liabilities, and the remedies to enforce these, of a married couple under Hindu Law? Can a Hindu wife refuse to go to her husband's house on the ground that he is a *Bholsar* or that she is unfit for cohabitation? What are the rights and liabilities of a husband and wife as regards contracts by husband and wife?

(6) What is a *Sarwaswadhaham* marriage and where does it prevail?

## CHAPTER IV.

# Sonship and Adoption.

**Sorts of Sons** :—The ancient Shastras enumerate as many as fourteen or fifteen sorts of sons. These represent most probably the stages of crystalization through which society had to pass, in the course of evolution. The fourteen sons are :—

1. The *Aurasa* (legitimate son :) (2) the *pûtrika putra*, (son of an appointed daughter), (3) the *kshetraja* (son begotten on wife), (4) the *gudhaja*, (son secretly born), (5) *kânina* (the damsel's son), (6) the *sahôdha* (son taken with the bride), (7) the *Paunarbhava*, (son by a twice-married woman), (8) the *Nishâda*, (son of a sudra woman), (9) the *pârâsara* (son of a concubine), (10) the *Dattaka* (adopted son), (11) the *kritrima* (son made), (12) the *kritaka* (son bought), (13) the *Aparidha* (son cast off), and (14) the *swayamdattaka* (son self-given).

The following sets of lines may be studied by students to remember these sons and their descriptions in short.

औरसः पुत्रिकापुत्रः क्षेत्रजो गूढजस्तथा । कानीनश्च सहोढश्च पौनर्भवनिषादकौ ॥
पारशवो दत्तकोऽपि कृत्रिमः कृतकस्तथा । अपविद्धः स्वयंदत्तश्चतुर्दशसुताः स्मृताः

Of these, 13 are described by *Yajnyavalkya* as follows: II 128-132.

औरसो धर्मपत्नीजस्तत्समः पुत्रिकासुतः । क्षेत्रजः क्षेत्रजातस्तु सगोत्रेणेतरेणवा ॥ १२८ ॥
गृहे प्रच्छन्न उत्पन्नो गूढजस्तु सुतः स्मृतः । कानीनः कन्यकाजातो मातामहसुतो मतः ॥१२९
अक्षतायां क्षतायां वा जातः पौनर्भुवः सुतः । दद्यान्माता पिता वा यं स पुत्रो दत्तको भवेत् ॥१३०
क्रीतश्च ताभ्यां विक्रीतः कृत्रिमः स्यात्स्वयंकृतः । दत्तात्मा तु स्वयंदत्तो गर्भे भिन्नः सहोढजः ॥१३१
उत्सृष्टो गृह्यते यस्तु सोऽपविद्धो भवेत्सुतः ॥

Of these, the distinction between a पुत्रिकासुत and a कानीन has to be noticed. The former is the son of an appointed daughter given in marriage with the repetition of the following *mantra* of *Vasistha*.

अभ्रातृकां प्रदास्यामि तुभ्यं कन्यामलंकृताम् । अस्यां यो जायते पुत्रः स मे पुत्रो भवेदिति ॥

I will give you this daughter decked with jewels and having no brother, the son that will be born of her will be my son. XVII. 17.

While the latter, (कानीन) is "born of a damsel as the result of infatuation before her *Sanskâra* (marriage)" Ibid. XVII 22, *Manu* IX 172.

All these are now obsolete long since. The only sons now recognised being the *Aurasa*, the son of a lawfully wedded wife, and the *Dattaka*, the son adopted. Among the Nambudris of Malabar, the son of the appointed daughter is still recognized as his heir. The *Kritrima* form prevails in Mithila.

## Adoption.

**Generally** :—The object of adoption is the perpetuation of the name *i.e.*, the lineage and (for ensuring) the offering of the funeral cake. water and solemn rite. as may be seen from the following couplet.

अपुत्रेण सुतः कार्यो यादृक् तादृक् प्रयत्नतः । पिण्डोदकक्रियाहेतोर्नामसंकीर्तनाय च ॥

**Authorities on adoption.**

The law of adoption is based on the texts of *Shaunaka*, *Manu* (IX 168) *Vasistha* (XV. 1–10). *Yajnyawalkya*, *Mitakshara*, *Mayukha*, *Dattaka Chandrika*, *Dattaka Mimamsa* & *Kaustubha*. The whole or almost the whole law is based on the metaphor of *Shaunuka* viz. that the boy to be adopted must be "the reflexion of a son" "पुत्रच्छायावहः". The authorities in detail have been specified in *Ganga Sahai v. Lekhraj Sing*, 9 All. 288.

**Division of the Subject** :—The Law of adoption may be discussed under the following specific points : (1) Who may take or adopt? (2) Who may give ? (3) Who may be given, with its cognate. who may be taken ?, (4) Ceremonies necessary for adoption. (5) Evidence of adoption. (6) The results of adoption. Of these in order :—

I. **Who may take in adoption or who may adopt ?** An adoption may either be made by the man himself or by his widow on his behalf. The substantial act of taking must be performed by one of the parents. *Lakshmibai v. Rámchandra*, 22 Bom. 590.

1. The adopter must be a Hindu, or at least one who has not openly renounced Hinduism. But adoption amongst Jains is, in the Bombay Presidency regulated by the ordinary Hindu Law, as their succession is. *Bhagwandas Tejmal v. Rajmal*, 10 Bom. H.C.R. 241; *Amava v. Mahadgarda*, 22 Bom. 416.

2. The adopter must be sonless *i.e.* without a male issue; and the word issue is indicative of the son, grandson and great grandson.

"पुत्रपदं पौत्रप्रपौत्रयोरप्युपलक्षणम्" दत्तक चंद्रिका

Accordingly, the existence of a great great grandson or a daughter's son is no bar to an adoption; nor is the previous existence of issues who are dead. *Rangamma v. Atchama*, 4 M.I.A. 1. *Ramabai v. Raya*, 22 Bom. 482.

An adoption invalid at its inception, cannot be subsequently validated by the happening of events which if they had happened at the time when the adoption took place, would have rendered the adoption valid. *Basu v. Basu.*

A man cannot have two adopted sons at a time, (*Rangamma v. Atchama*, 4 M.I.A. 1: *Mohesh Narain v. Tarack Nath*, 20 I.A. 30) Nor can the simultaneous adoption of two or more sons be valid as to any one of them. *Durga Sundari v. Surendra Keshar*, 12 Cal. 686: S. C. 19 Cal. 513: 19 I.A. 108.

3. A bachelor or a widower may adopt, *Gopal Anant v. Narayen Ganesh*, 12 Bom. 329: *Nagappa v. Subba Shastry*, 2 Mad. 37.

4. A man whose wife is pregnant (at the time of the adoption) may adopt, *Hanmant v. Bhimacharya*, 12 Bom. 105.

5. One *disqualified* to be *heir* may adopt a son. But that son can have no higher rights than himself and would be entitled to maintenance only.

The capacity or incapacity of a leper to inherit depends upon his performing or being capable of performing the necessary expiatory ceremonies. *Mohunt Bhagwan v. Mohunt Raghunandan*, 22 Cal. 843 (**P.C.**). And in a later case it was held that a Sudra leper may adopt, and that such an adoption would be valid in the absence of any proof that the disease of the adoptive father was inexpiable or that he was in such a state as not to be able to adopt at all. *Sukumari Bewa v. Ananta Melia*, 28 Cal. 168.

As regards *untonsured widows*, it has been held in Bombay that an adoption by her after making some expiatory gifts was good. *Ravji Vinayakar Jagannath Shankeshet v. Laxumbai*, 11 Bom. 381, 82. In a later case, where no expiation was found to have been made, the court treated this as a matter of religious ceremony and not as the essence of adoption: and the fact that she was untonsured at the time of the adoption was held not to be such a disqualification as would vitiate the adoption. *Lakshmibai v. Ramchandra*, 22 Bom. 590.

6. A minor may adopt, according to the dictum of Mitter J. in *Rajendra Narain v. Saroda*, 15 Suth. 548.

Such an adoption is valid, if the adopter has reached the age of discretion, and a widow, in Bengal, although a minor, may adopt. *Mandakini v. Adinath*, 18 Cal. 69.

But in Bombay no authority from the husband or consent from the kinsmen is necessary and the act of adoption is her own voluntary act out of her free will. Therefore, a widow, who is a minor cannot adopt, unless she is specially asked by her husband. But the widow of a man who died during his minority will not be precluded from adopting a boy to him. *Patel Vandran Jaikisen v. Manilal*, 15 Bom. 565.

7. **Adoption during pollution:**—Would be invalid if the period to be observed for mourning has not expired. See *Rámalinga Pillai v. Sadasiva*, 9 M.I.A. 506.

And where an adoption was caused to be made by the corporeal acceptance of the boy by a widow but while the corpse of her deceased husband was in the house, and the minor widow was compelled to adopt under threats that the corpse would not be allowed to be removed, the adoption was held invalid both on the ground of undue influence and coersion, and on the ground that it was made when the adoptive parent was in a state of pollution. *Ranganayakamma v. Alwar Setti*, 13 Mad. 214.

8. A Vaishya who has undergone the ceremony of *Vibhut Vida* is not incapable of adopting a son: and a custom alleged to the contrary must be satisfactorliy proved. *Mhalsabai v. Vithoba Khandappa Gulve*, 7 Bom. H.C. 26.

9. A member of the *Chudasama Gameti Garasia* caste is not precluded from adopting a son. *Verabhai v. Bai Hiraba*, 5 Bom. L.R. 534.

10. **Adoption by a wife:**—An adoption is made solely to the husband and he can adopt without a wife. But a wife can adopt to no one except to her husband, the only exception being that in a *Kritrima* adoption where she may adopt to herself.

There is a considerable difference of opinion as to the power of a widow to adopt and as to the limits of her right to exercise this power, irrespective of the existence or non-existence of authority from the hus-

band or consent from the Sapindas:—All the schools admittedly take their stand upon the following text of *Vasistha* "न स्त्री पुत्रं दद्यात्प्रतिगृह्णीयाद्वान्यत्रानुज्ञानाद्भर्तुः" "Let not a woman give or accept a son unless with the assent of her lord:" XV. 5. But the divergence arises by the manner in which this text is explained in each school. Accordingly under,

A. the *Mithala school*—the assent must be given at the time of the adoption and so there a widow cannot adopt at all under the *Dattaka* form.

B. the *Bengal* and *Benares schools*, such an authority may be given during the lifetime of the husband, and may be exercised after his death.

C. the *Maratha school*, it is necessary only when the adoption is during the husband's lifetime. It does not restrict her power of adoption after his death, if there is no express prohibition.

D. the doctrine in *Southern India*—the want of husband's authority may be supplied by that of his sapindas.

Thus the cases of Southern and Western India alone require to be considered.

**Nature of authority**:—No particular form is necesssary. It may be in writing or in words or by will. It may also be conditional, that is, the authority should take effect if a particular contingency occured, provided the adoption would be legal.

An authority to adopt if the wife and the son disagreed, would be invalid, as the husband himself could not have validly adopted during the son's lifetime. But an authority to adopt in case of death of such a son would be perfectly valid. *The Guntur case.*

The authority given must be strictly pursued, and can neither be varied from, nor extended (*Surendra Keshar v. Doorgasoondari*, 19 I.A. 108). So that if the widow is directed to adopt a particular boy, she cannot adopt any other even though he should be unattainable. This authority becomes exhausted as soon as the adoption is made, and death of this son will not authorize a second adoption. In Madras, want of husband's authority may be supplemented by that of the

Sapindas and a second adoption, with their consent may be made. *Parashara Bhuttar v. Rámánuja*, 2 Mad. 202.

*N. B.*—When the authority is general it may be exercised any number of times irrespective of the individual, whose name occurs in the authority as a mere accessory. But it would be otherwise where the authority is special, in which case it comes to an end as soon as once exercised.

Where the authority does not specify the manner in which the estate should be enjoyed by the widow or the son, an agreement with the natural guardian of the boy to be adopted, allowing the widow to be in enjoyment for life, of the property, is valid and binding upon the boy.

A Hindu widow, in pursuance of authority given by her husband, since deceased, adopted plaintiff, a minor. A registered document was executed by the widow on the day of the adoption, wherein the fact of the adoption was recited, and certain terms were set forth as to the manner in which the property of the deceased adoptive father should be enjoyed as between the plaintiff and the widow. By those terms it was declared that, in the event of disagreement between plaintiff and his adoptive mother, the property described in the second schedule should be enjoyed by the latter during her life, and should be taken by the plaintiff after her death. The authority under which the widow adopted had been given orally, and merely enabled her to adopt a son and made no reference to the manner in which the estate of the deceased should be enjoyed either by the son or the widow. The effect of the arrangement was to vest in the widow, on the contingency mentioned, for her life, about a moiety of the property inherited by her from her husband. The terms embodied in this agreement were consented to by the plaintiff's natural father prior to the adoption, and it was in consequence of such consent that the adoption took place and the document was executed. Disagreements arose between plaintiff and the widow, and plaintiff, still a minor, sued through his natural father as next friend to recover all the property of his deceased adoptive father:—*Held*, that the provision in the document in favour of the widow was binding on the plaintiff and the widow was entitled to enjoy the property in the second schedule during her lifetime. *Visalakshi Ammal v. Sivaramien*, 27 Mad. 577.

An authority to adopt, given jointly to the wife and executors being incapable of execution, it was held to be bad in its entirety. *Amritolal v. Surnomoyee Dassee*, 27 I.A. 27 Cal. 1003.

**Iyah Pillay's Case:**— (*Veerapermal v. Narain Pillair*, 1 N.C. 91). In this case the authority ran thus: "If Iyah Pillay beget a son besides his present son, you are to keep him to my lineage". At the testator's death Iyah Pillay had no second son. It was held that the widow was not bound to wait indefinitely and that, adoption of another boy was valid.

The document was construed as evidencing a primary desire to be represented by an adopted son, coupled with a secondary desire that that son should have been begotten by a named individual. This was followed in Bombay where the Court remarked as follows:—"It is common for a husband authorising an adoption to specify the child he wishes to be taken. Should that child die, or be refused by his parents, the authority will be held, at least in Bombay to warrant the adoption of another child, unless, indeed, he said, "such a child and no other". The presumption is that he desired an adoption and by specifying the object merely indicated a preference. Also see *Suryanarayan v. Venkataramaya*, 26 Mad. 681. *Lakshimibai v. Rajagi*, 22 Bom. 996.

This power of adoption becomes incapable of exercise when deceased has left a son who himself has died, leaving an heir to his estate. *Bhoobun Mayee v. Ram Kishore*, 10 M.I.A. 279. See also *Pudma Coomari v. Court of Wards*, 8 I.A. 229. In this case it was held that the boy, adopted by the mother-in-law while the heir of the last male holder was in existence, was not competent to direct the estate vested in her heir and so he was not competent to succeed even after her (widow of Bhawani). Both these cases were followed with approval in a later appeal from Madras. *Thayammal v. Venkatarama*, 14 I.A. 67: 10 Mad. 203.

And the same doctrine would apply *a fortiori* as against the independent right of a widow to adopt to her late husband in Bombay. *Ramji v. Ghamar*, 6 Bom. 498: *Keshar v. Govind*, 9 Bom. 94.

This question was subsequently considered in Bengal and Bombay, and the proposition laid down was that where the estate vested in no one but the adopting widow, she could adopt validly because by the adoption she divested the estate of no one else but her own.

On the same principle, the adoption by a mother-in-law, during the lifetime of the daughter-in-law, who succeeded as heir to the last male holder, was held invalid as against the adoption by the daughter-in-law. *Garadappa v. Girimalappa*, 19 Bom. 331; *Payappa v. Appanna*, 23 Bom. 327; *Jamnabai v. Raichand*, 7 Bom. 225; *Raoji v. Luximibai*, 11 Bom. 383.

And it has been very recently held that a Hindu mother, who succeeded as heir to her grandson and who died unmarried cannot make a

valid adoption. *Krishnarao Trimbak Hasabnis v. Shankarrao Vinayak Hasabnis*, 17 Bom. 164; *Ramkrishna v. Shamrao*, 26 Bom. 526 (F.B.)

But a mother succeeding her son who has left neither widow nor issue, is competent to adopt, notwithstanding the fact that her deceased son had attained ceremonial competency by marriage or otherwise before his death. *Gavadappa v. Girimallappa*, 19 Bom. 331; *Venkappa Bapu v. Jivaji Krishna*, 25 Bom. 306/2 Bom. L.R. 110. In *Manickchand v. Jagat Chettani*, 17 Cal. 578, where the parties were jains and no authority was required, it was held that a grandmother who succeeded to a grandson could validly adopt to her husband.

*N. B.*—Both in Bombay and Madras a widow can never adopt when expressly prohibited. *Bayabai v. Bala*, 7 Bom. H.C.R.

An Adoption by an **Unchaste widow** is invalid. At any rate she cannot validly adopt, unless she has gone through the expiatory ceremony. *Kerikalithani v. Moniram*, 13 B.L.R. 14.

**Adoption by several widows:**—When there are several widows, if special authority is given to any one, she alone can adopt without the consent of the rest. If the authority be given to them severally, the junior may adopt if the senior refuses. *Mandakini v. Adinath*, 18 Cal. 69.

In Bombay, where no authority is necessary, the senior has the right to adopt even without the consent of the junior widows; but the junior widow cannot adopt without the senior's consent, unless the latter leads an irregular life. *Rakhmabai v. Radhabai*, 5 Bom. H.C. R. 181.

But when once an estate has vested in a male heir and through him a widow succeeds, this right of the other co-widows to adopt under circumstances specified above, comes to an end. Note the following two cases.

A Hindu died leaving two widows, the senior having a daughter and the junior a son. The son died and *his* mother (the junior W.) succeeded to the estate. Subsequently the senior widow adopted a son without the consent of the junior: *held*, that the adoption was not valid. An adoption cannot be made without the consent of the co-widow, in whom the whole estate had vested by inheritance from her son. *Anandibai v. Kashibai*, 6 Bom. L.R. 464.

In a case in Calcutta, a Hindu, governed by the Mitakshara law died, leaving him surviving two widows G and B and a son S by G.

He had authorized B to adopt a son if S died unmarried, but had made no disposition of his property which was left to devolve according to Hindu Law. S died unmarried and B adopted without the consent of G. *Held*, that this adoption could not have the effect of divesting G of the estate which had devolved upon her as heir to her son. She was under no religious obligation to give her consent to the adoption by B. *Faizuddin v. Tincowri Saha*, 22 Cal. 565.

**Authority to whom to be given and when and how to be exercised:**

Where authority is required to be given, it can be given to the widow and widow alone. See *Amritolal v. Surnomoee Dasee*, 27 Cal. (**P.C.**); also Ss. 8, 13 and 47 of the Act II of 1882.

She is not bound to exercise her authority or direction in adopting a boy. She cannot be compelled to act upon it unless and until she chooses to do so. If she acts upon it under an undue influence, the adoption would be invalid. The result would be the same where she adopted in ignorance of the legal effect of the act as regards divesting her own estate. *Bayabai v. Bala*, 7 Bom. H.C. App.

A direction to adopt a particular boy cannot validly include conditions under which the adoption is to be made, and the widow is not bound by them (*Shamawahoo v. Dwarkadas*, 12 Bom. 262); and in *Asar Purshottam v. Ratan Bai*, 13 Bom. 56, it was left an open question whether a widow could bind herself not to adopt. Nor is there any limit as to the time during which a widow may act upon the authority given to her. *Nihal kuar v. Jaywantrao*, 4 Bom. H.C. *Giriowa v. Bhimaji Raghunath*, 9 Bom. 58.

Her power of adoption does not rest on any delegation from her husband, but is her own inherent right. The husband's right to forbid and the widow's consequent inability to adopt are referable, rather to the paramount duty of a Hindu wife to obey her husband's command, than to a delegation of power from him. His consent is, in the absence of prohibition, always to be implied. And where there is no express prohibition, nor can one be implied, the mere fact that a widow and her husband lived separate does not render the adoption made by her, invalid. *Luxmibai v. Saraswatibai*, 1 Bom. L.R. 420. Distinguishing *Dnyanoba v. Radhabai* P.J. for 1894 Page 22, where it was held that a Hindu wife who had misbehaved and was for 30 years living apart from her husband could not validly adopt a son, in the absence of an express authority from the husband or of evidence of her reconciliation

back to her husband, and consent of the husband's brother will not validate it.

**Nature of authority of the Sapindas**:—In Madras, want of husband's authority is made up by that of the Sapindas. This question was discussed in the following principal cases:—

1. **The Ramnad Case:**— In this case, the adoption was made by a widow who had taken as heir to her late husband, which was his separate estate. The adoption was made with the assent, though not of all, of the majority, of the Sapindas. Held both by the High Court and Privy Council that the adoption was valid. The Judicial Committee in upholding the adoption remarked : "It is not easy to lay down an inflexible rule. Every case must depend on the circumstances of the family. All that can be said is, that there should be such an evidence of consent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously, nor from corrupt motives." *Collector of Madura v. Mootoo Ramlinga*, 12 M.I.A. 317.

2. **The Travencore Case:**— Here the adoption was with the consent of the divided kinsmen but without the consent of the husband's undivided brothers. The adoption was held invalid.

3. **The Berhampur Case:**—(*Raghunádha v. Prozo Kishoro*, 3 I.A. 154.)

A Zamindar died, leaving a wife, a brother (undivided) and a distant and divided Sapinda. There were no other Sapindas. The widow adopted the son of the divided Sapinda, but without the consent of the undivided brother, under a written authority from her husband. This authority was proved and the court upheld the adoption. It has been held in Bombay that the widow of a deceased co-parcener in a joint Hindu family is, under an authority given to her by her husband, competent to adopt a son, although the effect of the adoption may be to divest the estate of a son of the other co-parcener. *Bachoo v. Mankorbai*, 6 Bom. L.R. 268; 4 Bom. L.R. 88. See also, *Surendra Nandan v. Sailjakant Das*, 18 Cal. 383.

Note:—This case (Berhampur) has to be noted especially for two points: in the court of first instance, it was put both upon the ground of husband's authority as well as upon the consent of the kinsmen, which, it was said, was implied, in as much as he gave his own son in adoption; and reliance was placed upon this latter ground. But the case failed there. The case in appeal was reversed, but chiefly on the ground

that the authority was held proved. The judicial committee observed that such an assent must be an intelligent assent.

It must be given by him, in the exercise of his discretion, as to whether the adoption ought or ought not to be made by a widow, who has not received her husband's authority to make it: and where she obtains it by representing that her late husband had authorized it, when, in fact, he had not, such assent is insufficient in law. *Subrahmanyam v. Venkamma*, 26 Mad. 627.

4. **The Guntur Case:**— (*Velanki Venkata Krishna Rao v. Venkata Rama Lakshmi*, 1 Mad. 174, 4 M.I.A. 1.). Here, the family was divided. All the Sapindas had assented and the persons in possession of the property had no title whatever. But the High Court set aside the adoption, on the ground that there was nothing in the case, to show that the act was done by the widow, in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive.

**How far motives affect an adoption?** The discussion as to motives is based on and dates from the dictum of their lordship's in the Ramnad Case and in the Guntur Case. And in Madras, it has now been laid down that an adoption though sinful or irreligious, would not be void if it is not illegal, *i.e.*, made with the consent of Sapindas. *Balasu Gurulingaswami v. Ramakrishnamma*. 22 Mad. 398: 26 I.A. 113.

In Bombay, it was, for some time held that, the existence of improper motives would vitiate the adoption; but as a matter of fact, no circumstances whatever, could, in the eyes of the courts come up to be so improper as to vitiate the adoption. See *Vithoba v. Bapu*, 15 Bom. 134, *Patel Vandravan v. Manilal*, 15 Bom. 565 and cases in 22 Bom. 558.

The whole question, there, has now been settled by the Full Bench case of *Ramchandra v. Mulji*, 22 Bom. 558, where it was held, that where an adoption procures for the husband all possible religious benefits, which he could have desired, any discussion of her motives is inadmissible. The presumption is that she has performed her duties: and this presumption cannot be rebutted by the fact that her motives were of a mixed character.

The fact, that the widow has made terms for herself with the father of the boy, or that she has solicited a boy whose father is likely to accede to her wishes, is not sufficient to render the adoption invalid. In this case, the widow had adopted the

boy upon condition that the father or guardian of the boy, should give her Rs. 4000, it was held that the adoption was not bad on that account. *Mahabaleshwarbhant v. Durgabai*, 22 Bom. 999.

Nor, will an adoption be invalid, merely because it is made with the object of defeating the claim of a co-widow, to a share in her husband's property. *Bhimava v. Sangava*, 22 Bom. 206.

**The widow's power of adoption in Western India:**— The cases in Bombay have established the following propositions.

[1] In the Maratha country and in Gujrath, a widow, who is sole or joint-heir to her husband's estate, may adopt a son to her husband and without the consent of his kindred or of the caste or of the ruling authority, provided "the act was done by her in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from corrupt motives". *Rakhmabai v. Radhabai*, 5 Bom. H.C.R. 181: *Bhagwandas v. Rajmal*, 10 Bom. H.C. 257: *Ramji v. Ghamar*, 6 Bom. 498: *Dinkar v. Ganesh*, 6 Bom. 505.

[2] She cannot adopt where her husband has expressly forbidden her to do so. *Bayabai v. Bala*, 7 Bom. H.C.R. Appex 1. The prohibition, in such a case, must be express, and the courts will not be justified in drawing any presumption. See the remarks of their Lordships in 22 Mad. 395, upon the judgment of Westrop C.J., in *Lakshmappa v. Ramappa*, 12 Bom. H.C. 364.

[3] She can never adopt without her husband's assent during his life-time. *Narayen v. Nana Manohar*, 7 Bom. H.C.R. 153.

[4] A widow who has not the estate vested in her and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of her husband's undivided co-parceners. *Ramji v. Ghamar*, 6 Bom. 498: *Dinkar v. Ganesh*, Ibid. 505.

But where she adopts with full authority from her husband, such an adoption even in joint-family is valid. *Bachoo v. Khusaldas*, 4 Bom. L.R. 883, S.C. *Bachoo v. Mankorbai*, 6 Bom. L.R. 268: 29 Bom. 51.

*N. B.*—Where the adoption would have the effect of divesting an estate already vested in a third person, the consent of that person must

be first obtained. *Rupchand v. Rakhmabai*, 8 Bom. H.C.R. 14: *Gopal v. Vishnu*, 22 Bom. 250.

[5] An adoption, made by a widow which in other respects is valid, is not rendered invalid by the fact that the husband to whom she adopted was a minor. *Patel Vandravan Jekison v. Manilal*, 15 Bom. 565.

## II Who may give in adoption?

माता पिता वा दद्यातां यमद्भिः पुत्रमापदि । सदृशं प्रीतिसंयुक्तं स ज्ञेयो दत्रिमः सुतः ॥

मनु ९. १६८.

It is only the parent, and pre-eminently the father, who are entitled to give away their son in adoption. The father alone can absolutely dispose of his son in adoption, even without the consent of his wife, though such a consent is generally sought and obtained. *Chitko v. Jankee*, 11 Bom. H.C.R. 199.

No other relation can give a boy *e.g.* a step-mother. (*Papamma v. V. Appa Row*, 16 Mad. 384 : *Bhagwandas v. Rajmal*, 10 Bom. 241), a brother, or a paternal grandfather cannot give away a boy. *Collector of Surat v. Dhirsingji*, 10 Bom. 235. The parents cannot jointly or severally delegate this authority to another, so as to validate a gift by him, made after their death. *Bashotiappa v. Shirlingappa*, 10 Bom. 268.

But an authority to give during life-time may be given, by a Hindu father who has become a convert to Mahomedanism. Such a conversion does not deprive him of his power to give. *Shamsing v. Santabai*, 26 Bom. 851.

But it is doubtful whether this would hold good in the case of Brahmans where the Datta Homa is necessary. Ibid.

It should be noted that it is only the power, to exercise his discretion whether or not to give, that cannot be delegated. The physical act of giving may be done through another, if the giver is not in a position to do so. *Vijayarangam v. Luxman*, 8 Bom. H.C. 244; *Venkat v. Subhadra*, 7 Mad. 549; *Subbarayer v. Subbamal*, 21 Mad. 497.

A widow may, however, lose her right of giving her boy in adoption, on her contracting a second union by remarriage. *Panchappa v. Sanganbasava*, 1 Bom. L.R. 543.

The natural parents may impose conditions at the time of giving consent. *Rangubai v. Bhagirthibai*, 2 Bom. 377.

As regards **consent by Government**, it is only a matter of political rights vested in government, and such a consent is not obligatory under the provisions of Hindu Law strictly so called; and it has been held in *Balaji v. Datto*, 4 Bom. 762 that the consent of the Government or of the Bandhavas is not essential to the validity of an adoption among vatandars. See also the cases of *Bhaskar v. Naro Raghunath*, Bom. S. I. Rep. 24; *Ramchandra v. Nanaji*, 7 Bom. H.C.R. 26; *Narhar Govind v. Narayen*, 1 Bom. 607.

## III Who may be (A) Taken and (B) given in adoption?

As far as possible, the nearest male Sapinda and especially a brother's son should be selected. But there is no restriction as to choice in this manner except, that the boy must not be out of the caste of the adopter: and it has been now settled that the adoption of a stranger is valid, even though near relatives, otherwise suitable, are in existence. *Babaji v. Bhagirthibai*, 6 Bom. H.C.R. 70.

So it was held in the case of *Garbhari Gosains*. But one son is never adopted to the prejudice of others, and in the absence of an adopted stranger, sons succeed equally. *Balgir v. Dhandgir*, 1 Bom. L.R. 144.

1. A male child only can be adopted; a daughter (though sanctioned by the *Dattaka mimamsa*) cannot be adopted. *Ganga Bai v. Anant*, 13 Bom. 690. *Note*. However, that a Naikin or dancing girl may adopt a daughter, if the purpose of the adoption is not immoral or illegal. See *Venku v. Mahalinga*, 11 Mad. 393. *Manjamma v. Sheshgirirao*, 26 Bom. 491.

2. The adopted son must be of the same caste. According to the text of *Shaunaka* cited in the *Dattaka Chandrika*, a Sapinda should be adopted: in his absence a *sagotra*, and then a *bhinnagotra*: but a *sajâtiya* may be selected.

3. No one can be adopted whose mother, the adopter could not have legally married when in a maiden state; and so, the adoption of a daughter's sister's or an aunt's son has been held invalid by all the High Courts. *Gopal v. Hanmant*, 3 Bom. 273; *Bhagirthibai v. Radhabai*, 3 Bom. 298.

The Allahabad High Court had held by a majority (Edge C.J. Knox, Blair and Burkitt J.J.) in the case *Bhagwan Sing v. Bhagwan Sing*, 17 All. 294 (**F.B.**), that the adoption of a daughter's, sister's or maternal aunt's son was not invalid. But the Privy Council has reversed this decision of the majority and held with the minority that such adoptions were invalid according to Hindu Law S.C. 21 All. 412.

But this test restricting the circle of persons eligible as sons to be adopted should not be extended beyond its proper limits. And an adoption by a widow of her brother's grandson was held to be perfectly valid. The court held that there is no valid reason for extending the rule "no one can be adopted whose mother, the adopter could not have legally married" —a rule which manifestly applies to the case of a male person adopting a boy to himself—to the case of a female. *Jaisinghpalsingh v. Bijayapal-Singh*, (1904), 2 All. L.J. 36; A.W.N. (1905), 20. *Giriowa v. Bhimaji*, 9 Bom. 58; *Bai Nani v. Chunilal*, 22 Bom. 973. (A widow may adopt a brother's son).

4. On the same ground it is unlawful to adopt a brother, or a step-brother or an uncle whether paternal or maternal. *Minakshi v. Ramanada*, 11 Mad. 49.

But such adoptions are valid, if sanctioned by usage. *Virayya v. Hanmant*. 14 Mad. 459.

And it has been held in Bombay, that the adoption of a sister's and a daughter's son is valid by custom among the Saraswat Brahmans in Kanara. *Manjunath v. Kureribai*, 4 Bom. 140: *Gawri v. Shirram*. P.J. for 1894, Page 30.

5. A wife's brother or the son of her sister may be adopted; so may the son of a maternal aunt's daughter. *Venkat v. Subadra*, 7 Mad. 549.

6. One, who from any personal disqualification would be incapable of performing the funeral ceremonies, would, it seems, be unfit for adoption.

7. As to age, there are two principal schools. According to the one in which may be included the Benares, Bengal and Madras doctrines, the boy to be adopted, of a Brahmin, must not be above an age necessary for the performance of the *Upanayana* Ceremony. Among the Sudras, there being no necessity of the *Upanayan*, an adoption could be performed effectually till marriage.

According to the other school, this restriction of age has no place in determining the validity of adoption. Among the Jains, the period extends to 32, and *Nilkanth* remarks that a married man, who has even a son, may become an adopted son. According to this school, there is no limit as to age. The boy to be adopted must not be elder than the person adopting,— *i.e.* the male to whom the adoption is made. It does not extend to the female who makes the adoption. *Gopal v. Vishnu*, 23 Bom.

8. An **only Son** may now be adopted. Such an adoption is now valid under all the schools viz.

In **Bengal**—*Manick Chandor v. Bhaggopatty*, 3 Cal. 443. In **Madras** and *Shri Balasu Gurulingasami v. Ramalakshmanan*, 22 Madras 398, **(P.C.) Allahabad**—*Radha Mohun v. Hardai Bibi.* Ibid and 21 All. 460 **(P.C.)** In **Bombay** *Vyas Chimanlal v. Vyas Ramchandra*, 24 Bom. 367 **(F.B.)** and *Krishna v. Parameshvari*, 25 Bom. 537.

**History of the question.**

In Bombay alone, the prohibition against the adoption of an only son continued and had received judicial support as late as 1890. (*Waman Raghupati Brown v. Krishnji*, 14 Bom. 249 **(F.B.)** and 1899. The earlier decisions were to the effect that though such adoptions were bad in religion, they were not bad in law. *Haebatrao v. Govindrao*, 2 Bom. 75, 87, and this was the view that prevailed in several cases of the Bombay High Court *e.g.* See *Mhalsabai v. Vithoba*, 7 Bom. H.C. 26; *Raje Nimbalkar v. Jayawantrao*, 4 Bom. H.C. It was however on account of a dictum of Sir. M. Westropp (12 Bom. H.C.R. 364) in *Lakshmappa v. Ramappa*, that the current in Bombay began to change in an opposite direction, until, at last, in the Full Bench case in 14 Bom. 249, the court held that the adoption of an only son was invalid and this decision was followed in *Bai Jadar v. Bai Mathura*, 17 Bom. Later on, the Privy Council having declared such an adoption to be valid in the Cases of Madras and Allahabad, a Division Bench of the Bombay High Court, referred the question to a Full Bench, which held that such an adoption was valid even under the Mayukha. 24 Bom. 367.

9. As regards the adoption of an **eldest son**, the tests prohibiting such an adoption are disuasive and not peremptory. *Kashibai v. Tatya*, 7 Bom. 221; *Jamnabai v. Raichand*, Do. 225.

And where an eldest son was given in adoption, after his father's death, by his mother and there was neither express assent or prohibition by her husband, it was held that the adoption was valid. (The parties were Lingayats.) *Tukaram v. Babaji*, 1 Bom. L.R. 144.

Among the Lingayats of Dharwar, the adoption of an only or an eldest son is valid. *Basawa v. Lingangarda*, 19 Bom. 428.

The **doctrine** of *Factum valet* is applied in such cases of adoptions in contravention of express texts, where the command is not mandatory but only directory. Where the command is mandatory and leaves no

alternative. a breach of it will not be cured. *e.g.* adoption by a younger. without the consent of the elder widow. *Padaji Rao v. Ram Rao*, 13 Bom. 160.

Its authority does not depend upon any rule of Hindu Law alone, but upon principles of justice and good conscience. Its application in cases of adoption should be confined to questions of Ceremonies, preference in the matter of selections, and similar points of moral or religious significance, which may be called the *Modus Operandi* of adoption but do not affect to essence. Adoption under the Hindu Law being in the nature of a gift, contains three elements: (1) Capacity to give, (2) capacity to take and (3) Capacity to be the subject of adoption, which are essential to the validity of the transaction as such and are beyond the scope of the doctrine of *Factum valet.* Per Mahmud in *Gangasahai v. Lekhraj Singh*, 9 All. 288.

10. It is necessary that there must be some one to give and so the adoption of an orphan is invalid. *Balvantrao v. Bayabai*, 6 Bom. H.C. 83. *Subbaluvammal v. Ammakutti Ammal*, 2 Mad. 129, nor can a *paluk putro* or a putrika putra be validly adopted. *Kalle Chunder Chowdhary v. Shib Chunder*, 6 B. L.R. 501 (**P.C.**). *Nursing Narayan v. Bhuttor Lall*, W.R. (1864) 194.

11. The adoption of a boy in his absence, by a mere execution of deed and without any actual giving and taking is not valid. *Dhapabai v. Champulal*, 1 Bom L. R. 842.

12. Where an orthodox Hindu adopted an infant son of a member of the *Sadharan Brahmosamaj*, it was held that in the absence of special proof of custom, such an adoption was valid under the Hindu Law. A Hindu can revert to Hinduism and it is for the party impugning this fact, to prove that he did not. *Kusam Kumari Roy v. Satya Ranjana Das*, 30 Cal. 999.

**Dwyamushyayana** form of adoption *i.e.* the adoption of a son by two fathers. Generally this takes place by one brother adopting the son of another, so that he remains the son of two. Such an adoption is valid in Bombay and the power of giving and taking an only son in adoption is not confined to brothers, but may be exercised by their widows. *Krishna v. Parameshari*, 25 Bom. (supra). It has been held in Bombay that this form prevails in Bombay among the Lingayats- *Chenava v. Basangavda*, 21 Bom. 105. (Ibid.)

An adoption in the absolute *Dwyamushyayana* form depends upon, and has its efficacy in, the stipulation entered into at the time of adoption between the natural father and the adoptive father and does not depend upon the performance of any ceremony by the natural father *Behari Lal v. Shiblal*, 26 All. 472. The natural mother of a Hindu, adopted in this form with another branch of the same family, does not, in the absence of nearer heirs, lose her right of succession to this son, on account of this adoption. (Ibid.)

**IV. Ceremonies necessary for adoption:**—The first and the most essential element of adoption is the giving and receiving, *Dana Pratigraha* दानप्रतिग्रह; the next in point of importance is the *Datta Homa*, which, it has now been established by authorities, is essential among the three regenerate classes. Among the Sudras, it is not so necessary; where the giving and taking had duly taken place, and it was held to be no objection on the part of a widow, who in this case was a mere girl of 15, that she remained in an inner room and deputed a relation to perform the Homa and other religious ceremonies. *Lakshmibai v. Ramchandra*, 22 Bom. 519: *Vyas Chimanlal v. Vyas Ramachandra*, 24 Bom. 413.

Where the omission of the ceremonies has been intentional with a view to leave the adoption absolutely invalid, or where from death or any other cause, the ceremony has not been carried out and no condition has taken place, there would be no complete adoption.

So an adoption by will, without the performance of necessary acts will be invalid; and mere giving and receiving by symbolical transfer are not sufficient. There must be an actual gift. *Mahashoy Shoshinath v. Sri Nath Krishna*, 7 I.A. 250.

The Dutta Homa is necessary among the three higher classes. But when the adoption is in the same family by a member of one belonging to another branch, the *Dutta Homa* is not necessary, *i.e.* where the parties belong to the same *gotra*. *Valubai v. Govind Kashinath*, 24 Bom. 218.

**V. Evidence of adoption.** No particular evidence is required to prove an adoption. It should be proved like any other fact by the person who sets it up. (Cf. S. 103 of Act I of 1872). But there are **presumptions** which variously arise in favour of one or the other of the disputants and courts may take these into consideration. *e.g.*

The deceased dying without issue and in advanced years or from long confining sickness and leaving behind him considerable property, especially when a person, who would succeed if there were no adoption, was not on good terms with him, as also where he leaves a young and inexperienced widow, who would be a dependant for her maintenance upon remote collaterals whose sympathies were probably estranged.

As to **writing**, strictly speaking, it is not necessary, though it is generally resorted to, wherever the interest affected by the adoption was considerable.

As to the value of **previous litigation** on the point of adoption the existence of a judgment in favour of an adoption is evidence of the fact of adoption, and though the decree or order might not be binding and conclusive as to third persons, still it would be very important as evidence in the case.

**Lapse of time** may operate in two ways:

1st. In strengthening the probability of adoption *e.g.* where long years have elapsed, and the adopted boy has been treated by the family and the world at large as such. Or 2ndly in *barring* any attempt to set it aside, either by way (1) of estoppel or (2) by the statute of limitations. As for the first.

As regards the *first* a merely passive acquiescence, in an infringement, of his rights, or an assertion of an adverse right by another person will not prevent the person from afterwards maintaining his own strictly legal right in a court of law, if his suit is not otherwise bad in law *e.g.* on account of limitation &c. But it would be otherwise if his acquiescence amounts to an active consent to conduct on the part of another, of which he might justly complain. If *e.g.* by his own conduct, he encourages another to believe that he has not the right, which he really possesses or if he thereby induces him to certain acts, omissions or beliefs, which acts, omissions or beliefs, this other would not have done or entertained but for this representation, then such a person would be *estopped* from afterwards disputing the right of that other and even when the alleged adoption is an invalid one. *Rama Rau v. Raja Rau*, 2 Mad. H.C. 114; Cf. *Ramabai v. Raya*, 22 Bom. 482 (per Ranade J. at pages 487,488). See section 115 of Act I of 1872.

As ragards the *second*—**Limitation** will be a bar to suits for possession of property under colour of an adoption. The important question for consideration in these cases is, "From what time did the statute begin to run?" In cases where the person setting up the adoption is himself concerened, there

is no difficulty. But the difficulty would arise where an adopted son is in possession, but his opponent is a reversioner whose rights would arise only after the death of an intermediate holder *e.g.* a widow. On this point, there has been a direct conflict of authorities between several courts. On the one hand, the **Bombay** High Court has held unanimously in the full Bench case of *Shrinivas v. Hanmant*, 24 Bom. 260, followed in *Barot Narayain v. Jesang*, 25 Bom. 26, and the **Madras** High Court in *Ratnam-asari v. Akilandammal*, 26 Mad. 291 (**F.B.**)by a Majority, have held that a claim for possession would be barred even if brought within twelve years, but after six years, if it depended upon a declaration as to the validity or invalidity of an adoption. While an exactly contrary view has been taken by the **Allahabad** High Court in *Lali v. Murlidhar*, 24 All. 195 and *Chandânia v. Shalig Ram*, 26 All. 40 (**F.B.**)and in **Calcutta** in *Jagannath Prasad v. Rangit Singh*, 25 Cal. 354 and by *Bhashyam Iyyengar* J. in 26 Mad. 391 (**F.B.**)

This difference of view is due to the construction placed by the several High Courts on certain decisions of the Privy Council, notably the decision in *Jagadamba v. Dakhina*, 13 I.A. 84; 13 Cal. 308, followed in *Mohesh Narain v. Taruck Nath*, 20 I.A. 30; 20 Cal. 487 and *Luchman Lal v. Kanhya Lal*, 22 I.A. 57: 22 Cal. 609. The first of these decisions was based on the interpretation of article 129 of the Limitation Act of 1871. That article provided for suits to establish or set aside an adoption. Their Lordships held that the "words to set aside an adoption" meant suits in which the validity or invalidity of an adoption was brought into question, and it was further held that such latter suits included all suits where a party cannot succeed without displacing an apparent adoption in virtue of which the opposite party was in possession. This decision was followed in 20 I.A. 30. The principle underlying these decisions was expressly stated by their Lordships to be that of *allowing only a moderate time within which* delicate subjects like *adoption disputes should be brought* in Civil Courts *for disposal.* The shortening of the period of limitation from twelve to six years in the Act of 1877 was obviously made by the Legislature in accordance with the views expressed by their lordships of the privy council. In suits governed by the Act of 1877, sufficient attention was not shown to these decisions and under a misconception of the decision in *Raj Bahadur v. Achumbit Lal*, 6 I.A. 110, it came to be held that the new Act of 1877 altered the old Law of 1871 and that a distinction was drawn between declaratory suits and suits for possession. While as a fact the decision of the Privy council recognized no such distinction. Suits for a declaration under the Act of 1871 were held to embrace all suits where a suitor cannot succeed without displacing an adoption in virtue of which the opposite party was in possession. This is the view taken by the Bombay and Madras Courts and in 24 Bom. 260, the following general principles were laid down and may be noted with advantage.

(1) Article 118 applies to every suit where the validity of defendant's adoption is the substantial question in dispute, whether such question is raised by the plaintiff is the first instance or arises in consequence of defendant setting up his own adoption as a bar to plaintiff's success.

(2) Art, 141 applies to the ordinary simple ease of a reversioner where the validity of the adoption is not the substantial point in dispute, or where the plaintiff can succeed without inpugning the validity of defendant's adoption. *Per Tyabji J.*

(3) In general, a combiation of several claims would not deprive each of its specific character and description. *Sir. L. Jenkins C.J.*

This view of the Privy Council decisions taken by the Bombay and Madras Courts does not find approval in Allahabad, where Burkitt J, in 26 All. 52, gives his dissent and the reasons for it. The question thus is of considerable importance and doubt and no definite rule can be laid down until it is dealt with by the Privy Counecil or as Benson J. has suggested in 26 Mad. at 322, "the legislature so amends the law as to remove doubts as to its true meaning".

**VI Results of Adoption:**—Generally, the adoption transfers the adopted son out of his natural family into the adopting family, so far as regards all rights of inheritance, and the duties and obligations connected therewith. But it does not obliterate the tie of blood or the disabilities arising from it. *e.g.* in questions of marriage or adoption &c. He ceases to perform the funeral ceremonies of the members of his natural family, and loses all rights of inheritance as completely as if he were never born in it. And conversely, his natural family cannot inherit from him, nor is he liable for their debts. *Pranvallabh v. Deocristion*, Bom. Sal. Rep. 4.

The act of adoption so completely confers the status of a son upon the person adopted into the new family that he has all the rights, capacities, and incapacities attached to him with reference to the new family which he would have had, had he belonged to it by birth. So that, he becomes a co-owner with his adoptive father *Ram Bhat v. Luxman*, 5 Bom. 630, can restrain alienations by the adoptive father of portions from the ancestral property: Ibid: and even though made in contemplation of the adoption *Vinayak Narayan v. Govindarao*, 6 Bom. H.C. R. 224: and he can claim by survivorship whatever property has been left by his co-parceners in the new family. *Ayyaru Muppanar v. Niladatchi*, 1 Mad. 45.

**His right of inheritance in the adoptive family:**—This right may arise when there is only an adopted son or when he co-exists with a subsequently born legitimate son. Again, succession may be either *lineal* or *collateral* and to each of these either *exparte paterna* or *exparte materna*. In all these cases, it has now been laid down that when once transferred into the new family by adoption, he is clothed with all the characteristics of a natural born son, and is treated as such. He

takes exactly the same share as a legitimate son. when he is sharing with all other heirs of his adoptive father, except the legitimate son.

**Succession of wives of adopter to the adopted son:**—Generally the adoption is by the father; and when no preference is given to any of the wives they succeed jointly. But the case would be different if the adoption is made not by the husband, but by his widow acting under his authority. In such a case, she cannot be compelled to perform it and when performing it, she represents her husband in the ceremonial. Therefore she would have preferentially a right to inherit as a mother and her co-widow would come in as a step-mother. *Degambery v. Taramony.*

In a recent case in Madras, the High Court, and in appeal, the Privy Council held, that where a husband made an adoption in conjunction with his junior wife and she died before the adopted son who died subsequently ,leaving a senior widow and a nephew, on the death of the adopted son,his property went to the nephew of the husband, and not to the senior widow, because, she was only a step-mother. *Annapurnai v. Forbs*, 23 Mad. 1; 26 I.A. 246; 18 Mad. 277.

In cases **where** there is **an after-born legitimate son,** the share of the adopted son according to the Law of *Bengal is one third* of the whole and in other provinces following the Benares Law *one fourth* of the whole, and so among the Jains. *Rukhlal v. Chunilal*, 16 Bom. 347. It has been held in Madras, on the authority of the *Saraswati Vilasa* that the fourth is not the fourth of the whole, but of the share of the natural born son *i.e.* one fifth of the whole. *Ayyaru v. Niladatchi*, 1 Mad. H.C. 45: *Giriappa v. Ningappa*, 17 Bom. 100.

Among Shudras, the adopted son shares equally with the after-born legitimate son, but this doctrine does not apply to impartible estates, where, the after-born legitimate son succeeds by preference. *Ramasami v. Sundaralingasami*, 17 Mad. 435. If an adopted son survives the after-born legitimate son, he takes the whole property by survivorship.

The **effect of an invalid adoption** is, so far as succession is concerned, according to the Madras doctrine, that the natural rights of the son remain quite unaffected. *Bawani v. Ambabay*, 1 Mad. H.C. Rep. 363; approved of by Westropp. C.J. in *Lakshmappa v. Ramappa*, 12 B.H.C.R. 397.

The validity of an adoption often becomes material as determining the validity of a gift or bequest and in such cases, the following general rules may be noted as deducible from the case law. Where the gift is made to a person who is described as possessing a particular character or relationship, the gift may be to him (1) absolutely as an individual, or (2) relatively as possessing that special character. (1) When the

gift is to him as an individual in his personal capacity, defect in his relationship would not vitiate his title; but (2) When the description is a material portion of the gift and is the principal test determining the devolution of the bequest, that relationship or character must be completely established and want of it will disable the person from succeeding to the estate. See the following cases:—*Nidhoomoni Debia v. Saroda Pershad*, 3 I.A. 253; *Bireshwar v. Arda Chunder*, 19 I.A. 101: *Karsandas v. Ladkawahoo*, 12 Bom. 183; *Surendra v. Durgasundari*, 19 I.A. 108 and *Karamsi Madhowji v. Karsandas Natha*, 20 Bom. 718 and 23 Bom. 271 (**P.C.**)

**Adoption by a widow:**—When the widow is herself the heir of the husband, an adoption divests her estate and the son adopted at once becomes a full heir to the property; and so is the case of an inferior heir. But it would be otherwise, where a preferable heir has succeeded to the estate during the intermediate period. In such a case the adoption would not divest the estate vested in that heir, unless it is made with his authority or the authority from the deceased husband or unless the heiress is the adopting widow herself. See the cases of *Chundrbulle Guntur case*, *Bachoo v. Khusaldas*, 4 Bom.L.R. & 6 Bom. L.R. 268 *Vithoba v. Bapu*, 15 Bom. 110; cf also *Babu Annaji v. Ratnji*, 21 Bom. 319.

This may be illustrated by the following typical cases :—

A—where the property has descended to the son of B, to whom the adoption is made as in the *Guntur* case but has passed to a person different from the widow who makes the adoption; in this case, if the adoption is subsequent to the death of B, it has been held, that it will not divest the estate vested in the preferential heir.

N. died, leaving a widow, and a son S, by another wife. S. died unmarried and the step-mother adopted M, the son of one Bali Reddy. In a suit by Bali for a declaration that the adoption of M. by the widow was valid, it was held that on the death of S, his estate vested in his heirs and cannot be defeated by an adoption by his step-mother. *Annamah v. Mabbu Bali Reddy*, 8 Madras H. C. 208.

So where a father died, leaving widows, and also the widow of a pre-deceased son, who made an adoption, it was held that the adoption was invalid as her power of adoption was gone as soon as the estate vested in another. *Shri Dharmidhar v. Chinto*, 20 Bom. 250.

B.—Where property has descended from A, and the adoption has been made to B, a collateral relation of A. Here also, the adoption will not divest the estate. *Rupchand v. Rukhmabai*, 8 Bom. H.C.R. 144; *Ramji v. Ghamar*, 6 Bom. 498; *Dinkar v. Ganesh*, Do. 505.

**And generally,** the law on this point may be thus succinctly put in the words of Ranade J. in *Payappa v. Appanna*, 23 Bom, 327, 329 Sqq.

**As a general rule,** of strict Hindu law as settled by decisions, it is only the widow of the last full owner who has the right to take a son in adoption: and a person in whom the estate does not vest, cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietory rights. *Mt. Bhoobun Moyee Debia v. Ram Kishore*, 10 M.I.A. 279. *Padma Coomari v. Court of wards*, 8 I.A. 229; *Annamah v. Mabu Bali Reddy*, 8 Mad. H.C.R. 108; *Tarachurn v. Suresh Cunder*, 17 Cal. 122; *Keshav v. Gobind*, 9 Bom. 94; *Chandra v. Gojra*, 14 Bom. 463.

To this general rule there are **four exceptions** to be noted.

(1) In the case of co-widows, although upon the husband's death, they become joint owners of his property, no consent from the juniors is necessary for a senior widow to adopt a son. *Rukhmabai v. Radhabai*, 4 Bom. H.C.R. 181: *Ramji v. Ghamau*, 6 Bom. 498: *Amava v. Mahadgauda*, 22 Bom. 416: *Lakshmibai v. Saraswatibai*, 23 Bom. 789. Such a consent may be by conduct, as well as by acts. See *Bhimappa v. Basava*, 7 Bom. L.R. 405.

Note: this will not apply to Co-widows, one of whom succeeds as mother to her son dying childless. An adoption by the other widow without consent from the co-widow would be invalid. *Anandibai v. Kashibai*, 6 Bom. L.R. 464.

(2) In the case of a mother who succeeds as heir to an unmarried son, who dies without any nearer heir, after his father. In such a case, the right of the widow to adopt a son to her husband has been conceded to her, though such a son cannot properly be described as being the heir of the last full owner. This is done upon the principle that the act of adoption is derogatory of no other rights than those of the adopting mother. *Rajah Velanki Venkata Krishna Row v. Venkata Rama Lakshmi Narasayya* 4 I.A. 1; *Ramji v. Ghamau*, 6 Bom. 498; *Gardappa v. Girimallppa*, 19, Bom. 331; *Sangappa v. Vyasapa* P.J. for 1896 at P. 528.

(3) When the adoption takes place with the full assent of the party in whom the estate has vested by inheritance *(e.g.* when the adoption is by a daughter-in-law with the consent of the father-in-law, in whom the estate had vested) the adoption is validated by such consent. *(The Ramnad case, Sriraghunadha v. Sri Brojo Kishore*, 3 I.A. 154.) P. 82. When such consent was proved to have been given by the party in whom the estate had vested, the adoption was upheld, though it had the effect of divesting the party, giving such consent, of his rights *(Rupchand v. Rakhmabai*, 8 Bom. P.C.R. 114; *Babu Annaji v. Ratnoji*, 21 Bom. 319), compare also *Bachoo v. Khushaldas*,—without such consent the adoption would be invalid. *Vasudeo v. Ram-*

*chandra*, 22 Bom. 81. But such consent will not operate after his death, so as to divest an estate vested in others by that event. And an adoption by a widowed daughter-in-law under an authority given in the will of the father-in-law, will not be valid as against the daughters in whom the estate became vested immediately after the father's death. *Lakshmibai v. Vishnu*, 7 Bom. L.R. 430.

(4) The fourth is an offshoot of, and deducible from, the third viz. that which is based on the principle of ratification by conduct or acquiescence. *Sadashiv v. Hari*, 11 Bom. H.C.R. 190: *Rajendru Nath v. Jagendro Nath*. 14 M. I. A. 67: *Ravji v. Laxmibai*, 11 Bom. 381: *Sukhbasi Lal v. Guman Singh*, 2 All. 366.

**How far previous acts or dispositions affect or postpone a son's estate?** In Bengal, a father has absolute power over his property, and he may couple with his authority to the widow to adopt, an express power for her to hold the estate during her life, or put in any other condition derogatory of the adopted son's interest. *Bepin Behari v. Brojonath Mookhopadhya*, 8 Cal. 357.

But under the *Mitakshara*, where a person makes a complete and unconditional adoption, he cannot derogate from its operation either by deed or by birth.

**Unless**—(1) The property is impartible *Sartaj Kuari v. Deoraj Kuari*, 15 I.A. 51; 10 All. 272, *Venkata Surya Mahipati v. The Court of Wards*, 26 I.A. 83. 22 Mad. 383 or (2) part of the property was disposed of by the same deed or will by which the adoption was sanctioned & this part disposition was known to, and acquiesced in by the father of the boy, *Lakshmi v. Subramanaya*, 12 Mad. 490; *Vinayak v. Govind Rao*, 6 Bom. H.C. 224; *Bassava v. Lingangavda*, 19 Bom. 428. Note: But this will not hold where the whole property has been disposed of.

And if a parent of the boy to be adopted, expressly agree with the widow that she shall be entitled to a life estate in the property, and the adoption is on these terms, the agreement will be binding upon the boy adopted, and he cannot subsequently impugn it. *Chitko v. Janki*, 11 Bom. H.C. 199; *Raoji v. Lakshmibai*, 11 Bom. 381, 388; *Visalakshi Ammal v. Sivaramian*, 27 Mad. (**F.B.**) 577. But see contra *Radhabai v. Damodar*, P.J. for 1878 P. 9.

Such an arrangement will not, however, give the widow any wider powers of disposition than she ordinarily possesses *as a widow*, and any alienations made by the mother without necessity will not be valid beyond her lifetime or binding upon the son after her death. *Antaji v. Dattaji*, 19 Bom. 36.

The son's rights arise immediately after the adoption and date back to the death of the father. But he must acquiesce in all the dealings with the estate, between the death of his adoptive father and his own adoption when such dealings have been entered into by the person in possession, whether such person is a widow, daughter or a mother; and such acts

will be binding upon him if they are within the scope of the authority of the person in possession.

**Kritrima Adoption:**—It has been said that the adoption cannot be to the widow herself, but to her husband. To this, an exception has been stated to be that of dancing girls (26 Bom. 491). Another exception is that of the *kritrima* form of adoption. This form is still recognized in Hindu Law and prevails in Mithila and on the west coast among the Nambudri Brahmans. In Mithila, the husband's consent being necessary at the time of the adoption, an adoption, under the *Dattaka* form, by the widow, is absolutely impossible and this form is therefore resorted to and is prevalent there.

There is **no limit of age** under this form: the initiatory rights need not be performed in the new family, and their performance in the natural family is no obstacle. Even marriage is no bar, as a man may adopt even his own father. **Any person may be adopted,** provided he belongs to the same tribe. The **result of such adoption** is that the son loses no rights of inheritance in the natural family; he inherits to his adoptive father only, and has no claims upon the property of that father's relatives, or his wives &c. Nor do his sons take any interest in the property of the adoptive father. The relationship is limited only to the parent adopting on the one side and the person adopted on the other. Under this form a woman is at liberty to adopt to herself, as under it the estates of the husband and wife are looked upon as separate. *Collector of Tirhoot v. Huropershad*, 7 Suth, 500. **No ceremonies** or sacrifices are **necessary.** The consent of both is the only requisite.

**Examination: Short Summary.** Fourteen sorts of sons are enumerated by early lawyers. Of these only three, viz. the *Aurasa*, *Dattaka* and *Kritrima* are to be found in the present period; the rest are obsolete. The chief object of adoption is the perpetuation of the lineage and the performance of the funeral and other rites. Only those who have no issue *i.e.* son, grandson or great-grandson, can validly adopt; and an adoption invalid at its inception *e.g.* on account of the existence of a son, cannot be valid afterwards by that son easing to exist. A bachelor, a widow, a man disqualified to inherit may adopt; so may a minor. An adoption during pollution wou'd be absolutely invalid if the necessary period of expiation has not been lived out. As to an adoption by a wife, she may adopt in Bengal with the husband's consent, in Madras this may be supplied by the sapindas in its absence, in Bombay no consent is necessary and in Mithila no consent is sufficient except it be at the time of adoption. This

authority may not be in any particular form. It may be in writing or even by word of mouth. But it must be strictly pursued. When several widows survive the deceased, those who have special authority may adopt, and when the authority is general, any one may adopt. When there is no authority, the senior may adopt without the consent, or even in spite of the dissent of the junior but not *vice versa*. The motives of the widow do not at all affect the adoption, provided the act was a *bona fide* performance of a religions duty and did not proceed from capricious or corrupt motives. In Western India, a widow may adopt at her will, unless she is expressly forbidden to adopt, or unless the adoption is during husband's life-time in which case, his consent would be necessary. In a joint family she may adopt if she is authorised by her husband or his surviving co-parcener. Only a father or mother can give a son in adoption. After the promise is given and the discretion exercised, the physical act of giving may be delegated to another. A son to be adopted must be, as far as possible a reflexion of the natural born son. He must be one whose mother the adopter could have lawfully married in her maiden state but this fiction is not to be carried any further. An only or an eldest son may be adopted. To bring about a complete valid act of adoption, the giving and taking " दानप्रतिग्रह. " is absolutely necessary. The Dutta Homa may or may not take place and in the same gotra is not necessary. An adoption may be proved by actual evidence as to giving and taking and by the natural presumption of fact and law that may arise, having regard to the facts and surrounding circumstances. It may also be proved by previous litigation between the parties or between one and another stranger but in which the question of the adoption was at issue and was decided. The title as to adoption may become complete by the active, positive, right of the son adopted or by the negative force lent to his position by the neglect, laches or acquiesence of the opposing party. When a suit for possession depends upon the title to adoption, it becomes barred if the suit as to the last relief is beyond time. The result of adoption is that it completely severs the connection between the boy adopted and his natural family, and places him in the new family, with the same capacities and incapacities attaching to him as if he were born in it. This does not sever however the natural tie so as to remove the incapacity as to marriage. If the adoption is invalid, the boy reverts to his natural family. As to the effect of an adoption by a widow, when she herself is the heir, the adoption confers a good title upon the son. But when the estate has vested in another, her adoption will not devest it except it be with the consent of such heir of her husband. Lastly, as soon as the adoption takes place the son is supposed to be born into the new family

and this dates back to the death of his adoptive father. But this will not prejudice anything legally done during the intermediate period. The *Kritrima* form of adoption prevails in Mithila. It is not subject to any of the conditions and limitations which attach to an ordinary adoption.

QUESTIONS:—(1) How many sorts of sons are mentioned in Hindu Law? How many of these are now to be found? Describe them shortly. Distinguish between a *Kânina* and a *putrikâ-putrâ*.

(2) What is the object of adoption? Who can adopt? What are the conditions necessary for a valid adoption? Can a bachelor or widower adopt? Can one disqualified to be heir adopt? If so, with what results? Discuss fully.

(3) How far motives of a widow affect an adoption, which is otherwise valid? Discuss the power of a widow to adopt in the several provinces of India. What are the requisites of a valid authority? Cite cases specifying the conditions under which it comes to an end or subsists.

(4) What was laid down in the (a) Ramnad and (b) Guntur cases? What is the extent of a widow's power of adoption (1) generally and (2) in Western India?

(5) Who may give in adoption? Can this power be delegated?

(6) Who may be taken in adoption? What is the principal rule in this connection? Can an only son be adopted in Western India? Discuss the question fully, giving a brief account of the subject? What is the Doctrine of *Factum valet* and how far does it apply in cases of adoption?

(7) Describe briefly the *Dwyamushyayana* form of adoption?

(8) How far limitation of time affects a suit for possession dependent upon a previous question of adoption or no adoption? Will the one suit be barred if the other is? Cite cases and discuss the question fully.

(9) What are the results of a valid and of an invalid adoption?

(10) "An estate once vested cannot be subsequently divested by an adoption." What are the limitations and exceptions to this proposition? Discuss the question fully with special reference to cases.

(11) Describe fully the *kritrima* form of adoption.

## CHAPTER V.

# Minority and Guardianship.

**Period of Minority**: Under Hindu Law, Minority terminates at theage of sixteen, "बाल आषोडशाद्वर्षात्" नारद: some text writers holding that it ends at the beginning, and others at the termination, of this period. The Bombay school adopts the latter limit. All these variances have now been set at rest by the passing of the Indian Majority Act (IX of 1875), according to which, every minor, of whose person or property, a guardian has been appointed by the courts, and every minor under the jurisdiction of the court of wards attains majority at the end of his 21st year; and in all other cases, he becomes major at the end of his eighteenth yeer.

**Guardianship:— Kinds of Guardians.** Guardians are either (1) *natural* or (2) *appointed.*

(1) The natural guardians are those in whom the right of guardianship exists on account of their special relationship to the minor. They are, the king, the parents &c.

(2) Guardians are *appointed* by (*a*) will or (*b*) by court.

The sovereign is the guardian of a minor as *parens patriæ.* This powerof the sovereign is acknowledged to the extent of the property of a minor who has no (natural) guardian.* Generally, he is the paramount guardian of the subjects, and this right of guardianship is delegated in his public capacity (1) to courts, who can appoint guardians. *In re Manilal*, 3 Bom. L. R. 411 (**F.B.**) This power cannot be affected by an agreement *inter partes*. *Bai Rukhmini v. Mohanlal*, 4 Bom. L.R. 963. And in his private capacity (2) to parents and others standing in a particular degree of kindred towards the child. Of these, the *father* is the first: and next to him comes the *mother*. In an *undivided family under* the *Mitakshara Law* the right rests in the surviving male relations of the father. But where the family is divided, the mother has the preferential right. And it would not be a valid

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* बालदायादिकं रिक्थं तावद्राजानुपालयेत् । यावन्न स्यात्समावृत्तो यावच्चातीतशैशवः । मनुः ॥८॥ to which Kulluka adds in his gloss:— अनाथबालस्वामिकं पितृव्यादिभिरन्यायेन गृह्यमाणं तावद्राजा रक्षेत् । + + + यस्त्वशक्त्यादिना बाल एव समावर्तते सोऽपि यावदतीतबाल्यो भवति तावत्तस्य धनं रक्षेत् ।

defence to her claim of guardianship of the person of her adopted son, that she is only 18 years of age. *Rangubai v. Gopal*, 5 Bom. L.R. 542. Her right to the custody of childern, stands at all times.

As regards **females** when **married**. (1) *during coverture*, the husband is the natural guardian of his wife, unless by special custom, the exercise of this right is postponed, which can only be done till she is a major. *Arumuga Mudali v. Viraragava Mudali*, 24 Mad. 255. (2) As regards a *minor widow*, the husband's sapinda relations are preferable guardians over her parents *Khudiram v. Bonwari*, 16 Cal. 584.

This **right may be lost** by the guardian incapacitating himself by his act or conduct. *e.g.* (1) by a mother, by remarriage *Bai Sheo v. Ratanji*: *Panchappa v. Sanganbasava*, 24 Bom. 89: 1 B.L.R. 543 and (2) by the father by giving his son in adoption (*Lakshmibai v. Shridhar*, 3 Bom 1.)

When a guardian is appointed by will, the court has no power of removing him except for reasons stated in S. 39 of act VIII of 1890 (Guardian and wards); and old age by itself is not such a disability, as to justify a removal, unless there are specific Acts of mismanagement. *Rindabai v. Girdhar Lal*, 4 Bom. L.R. 799. And it was held in Madras that where a father had kept a concubine and had a family by her, and then married subsequently and had children he was not debarred from having their custody. *Jummalapadi Kalidas v. Attaluri Subuamma*, 7 Mad. 29.

(3) **Effect of Conversion.**—The mere fact that a father has become a convert to Christianity, does not preclude him from being the guardian of his childern *Muchoo v. Arzon*, W.R. 235.

This right of a guardian to the custody of the minors is an absolute right and cannot be defeated by any desire of the minor himself to the contrary, except on sufficient grounds *e.g.* the parents following up a line of life which is dangerous to the future prospects and interests of the minor; but this is a pure question of facts. This question has received frequent attention and notice from the courts and especially in cases where parents themselves were the guardians. The cases turn upon the question whether the right was affected by a change of religion **(1) by** the **parents (2)by** the **minor** himself.

1 Of the parents, the **father** will not be deprived of his right by a mere change of religion, unless it was attended with circumstances of immorality which showed that his home was no longer fit for the child to reside. R. V. Bezonji *v.* Perry, O.C. 91.

In a case in Calcutta, a father who had become a convert to Christianity had

applied to be appointed a guardian of the person of his son—a boy of 12 or 13 years of age. The child was brought up as a Hindu, had expressed a desire to remain a Hindu, and was living with his Hindu relation, who was looking after his education and maintaining him. It was held that it would not be to the welfare of the child that he should be handed over to the father and brought up in the Christian faith. *Mokoond Lal Singh v. Nobodib Chunder Singh*, 25 Cal. 881. So was done in a case in Mysore *Dasappa v. Chikama*, 17 Mysore 324. (Cited Mayne).

The case of a change of religion **by the mother** would be different. The religion of the father settles the law which governs himself, his family, and his property. But that is not the case with the mother. Where a change on her part would have the effect of changing the religion, and therefore the legal status of the infants, the court would remove her from the position as guardian. The father's right is so inseparable from his character as parent, that he cannot be bound by an agreement renouncing that right even though made *before* marriage, of which it was an essential part *Re* Agar Ellis, 10 Ch. D. 49: 24 Ch. D. 317.

(2) As regards change of religion **by the minor** the current of decisions in old days was, to allow the child to exercise his discretion, if, upon a personal examination, the court were satisfied that the wishes of the minor were to remain in his new religion. This current was changed by the Bombay Court in *Reg v. Nesbit* when they directed a boy of 12 years old to be given back to his father, and refused to enter into the question of his capacity to judge of his own interests or his wishes. This case was followed in Madras in *Kulloar Narainswamy* and in Calcutta in *Re Himnauth Bose*, 1 Hyde. 11.

More recently, the courts have refused to give effect to any inflexible application of this paternal right. Where the exercise of of this right was capricious and materially interfered with the welfare of the child, or where such rights have been forfeited by misconduct or acqueiscence or where there has been a voluntary abandonment of parental rights, the courts would decline to interfere. *Re Saithri* 16 Bom. 307. *Re Joshy Assam*, 23 Cal. 290.

After mother come the paternal relations, viz. the brother, paternal grand-father, paternal uncle and other paternal relations: then maternal relations. But in every case the choice will be made by courts, having regard to the interests of the minor.

As regards an **illegitimate child**, his domicle is that of the mother

and she is his natural guardian, unless she is estopped by conduct (*Kariyada Pokkar v. Kayat*, 19 Mad. 461): or unless she has incapacitated herself by continued immorality. *Venkamma v. Savitramma*, 12 Mad. 67.

**Contracts by Minors:**—Till 1903, the general rule in India was that a contract by an infant was only voidable and not void, though in specific cases are to be found dissentient judgments to the contrary (*Fulton* J. in 23 Bom. 146). But now the privy council has settled the question by holding that a contract by a person under age is not voidable but void *Mohori Bibi v. Dharmo Das*, 30 Cal. 539; 5 Bom. L.R. 421 followed in *Kamta Prasad v. Sheo Gopal Lal*, 26 All. 342 where applying the dicta of their Lordships in 30 Cal. it was held that Ss. 64 and 65 only apply to contracts between competent parties. The effect of these decisions is, that all Indian decisions, laying down that such contracts are voidable, stand overruled, and are no longer law.

But this would not affect the positions of parties under S. 68 of of the Contract Act, nor of one who has dealt with the guardian of the Minor and the contract is for the benefit of the minor. See remarks in *Annapagauda v. Sangadayappa*, 26 Bom. 221; *Ameer Bibi v. Abdool*, 3 Bom. L.R. 658.

**Contracts by guardian during minority:**—A guardian is competent to exercise or refuse to exercise the rights on behalf of the minor, and that, if the exercise or refusal was in good faith and for the benefit of the minor, the minor is bound. *Umrao Singh v. Dhulip Singh.*

It has been held by a Full Bench of the Bombay High Court, that a guardian can sign an acknowledgment under S. 19 of the Indian Limitation Act, so as to extend the period of limitation, provided it is for the protection and benefit of the minor. *Annapagauda v. Sangadyappa*, 26 Bom. 221; 3 Bom. L.R. 817. But in such cases, it must be shown that, such acknowledgment was for the benefit of the minor and in this connection the son's liability for the father's debts and the possibility of staying off the proceedings for immediate recovery may require to be considered. *Bhuli v. Nanalal*, 4 Bom. L.R. 812. Such contract or acknowledgment cannot bind the minor personally. *Lala Narain v. Ramanuj*, 25 I.A. 46; 20 All. 209.

A promisory note executed by the mother of a minor during his minority, for a debt binding on the minor's share in the ancestral estate, was held to be binding on

the minor to the extent of his share. *Subramania Ayyar v. Arumugam Chetty*, 26 Mad. 330.

So would be an agreement for partition effected during the minority of some members. Such an agreement could validly be made during the minority of such members. If on coming of age, they proved that it was unfair or prejudicial to their interest, they could, on proper proceedings, have it set aside so far as it concerned themselves. *Balkishen Das v. Ram Narain Sahu*, 30 Cal. 738 (**P.C.**).

**Creditor's duty in such cases**: But in such a case, the lender is bound to ascertain whether the guardian is acting for the benefit of the minor. And he can obtain a charge over the property, only when there has been due inquiry as to the necessity for the debt. *Dalibai v. Gopibai*, 26 Bom. 433. And it lies on him to prove justifying circumstances, which if he fails to show, the creditor will not succeed in enforcing his claim against the share of the minor. *Jamshetji N. Tata v. Kasinath*, 26 Bom. 326.

If on coming of age, the minor refuses to ratify the contracts entered into during his minority, he will be bound to restore whatever benefit his estate or himself may have derived from it. *Kurarji v. Moti Haridas*, 3 Bom. 234; *Siraya Pillai v. Munisawmi*, 22 Mad. 289.

But a purchase from the mother of a minor, when there is a guardian appointed by the court, cannot, on the sale being set aside, claim the refund of the purchase money from the minor. In this case it was further held that although the purchase money was utilized towards paying off debts for which the minor was liable, still the money could not be recovered, because the debts were paid not as the minor's debts, but as the mother's who claimed adversely to her son. *Nathu Piraji v. Balwant Rao*, 27 Bom. 390.

**False statement by a minor as to his age**: The prinicipal question in the High Court in *Mohari Bibi v. Dharmo Das*, 30 Cal. 539 was how far the infant was *estopped* by his representation as to his being of full age; and the High Court negatived the application of the doctrine of estoppel to minors. See. Jenkins J. in 25 Cal. 616 at P. 622 S. 99. On the general question of the applicability of this doctrine to minors, "Their Lordships did not think it necessary to deal with it then" 30 Cal. at/545. The effect of that decision on the plea of estoppel would be that all *contracts* by infants being void such a plea set up there, would fall to the ground.

But speaking **generally,** under the **English Law,** a minor representing himself to be of age will not be allowed to recede from his position unless he is prepared to restore the other party to a *status quo ante.* But this is an obligation in Equity, and must be distinguished from a contractual obligation. It is based upon the principle that "An infant shall not take advantage of his own fraud." Upon the same principles, but subject to the limitations as set forth above as under the Privy Council case in 30 Cal. 539, an infant will be estopped from suing, when he has led another party to believe that he was of age. *Ram Ratan Singh v. Sheo Nandan Singh*, 29 Cal. 126: *Ganesh Lala v. Bapu*, 21 Bom. 198 and *Sarel Chand v. Mohan Bibi*, 25 Cal. 391. and it is immaterial for the purpose of estoppel that his conduct was induced by a mistaken impression as to his age. *Nathubhai v. Mulchand*, 3 Bom. L.R. 535.

In order to invoke the doctrine of estoppel, the representation must lead another to his prejudice: otherwise, there would be no estoppel; *Nelson v. Stocker*, 4 De. G. & J. 458: *Mohari Bibi v. Dharmo Das*, 30 Cal. 539 (**P.C.**)

As to **decrees**—A minor who is properly represented in a suit will be bound by its results, whether that result is arrived at by (1) a hostile decree, (2) a compromise or (3) a withdrawal. *Kamraju v. Secretary of state*, 11 Mad. 309. But such a decree is liable to be set aside but if not set aside, binds him. Proceedings to have it set aside must be commenced within one year of his attaining majority *Art.* 12 Limitation Act: *Mungniram v. Mohunt Gursahi*, 16 I.A. 204: 17 Cal. 361. Where, however, he has not been properly represented, the decree is a nullity and he need not take any notice of it. *Daji Himat v. Dhiraj Ram*, 12 Bom. 18.

**Liability of a guardian**: See section 20, 21 and 27 of Act VIII of 1890. A guardian is liable for damages, arising from fraud or illegality. For debts due by the ward, the guardian is only liable to the extent of the assets received by him.

Where the guardian of a minor commits defalcations, the minor is not responsible as the wrong is committed by the guardian and he is personally liable. Thus, where the guardian of a minor in a joint Hindu family commits defalcation in respect to the joint property, the minor's property will not suffer. *Sonu Vishram v. Dhondu*, 6 Bom. L.R. 122; 28 Bom. 330.

**Examination: Short summary**:—The Hindu period of minority is 16: but the Legislature has now settled it to be 18 in ordinary cases and 21 where a guardian has been appointed by the courts or the minor is under the court of wards. Guardians are either natural, testamentary or appointed. The natural guardians of a legitimate child are the father, mother, brother, paternal grand father, paternal uncles and of an illegitimate child the mother and her relations. A father does not necessarily lose his right of guardianship over his children by his conversion, provided this does not prejudice the future well-being of the minor son. In the case of conversion of a minor, the court will not allow him to live with his new friends, if the parents object and have not othervise disqualified themselves. All contracts by a minor are void. But contarcts entered into by the guardian of the minor, and for his benefit, will be binding upon him on his attaining majority. But in such cases the burden lies upon the creditor to show that the debt was for a necessary purpose and that he had made the necessary inquiries.

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QUESTIONS:—(1) What was the period of minority under Hindu Texts and how does the law stand now?

(2) Enumerate the several classes of guardians and discuss the circumstances under which they are appointed and dismissed. How does the conversion of (1) a guardian (2) a minor affect the position?

(3) Can a minor validly enter into a contract? How far can guardians bind the minors by their contracts and acknowledgments? What steps should a creditor take for safeguarding his interests at the time of advancing a loan to the guradian?

(4) Estimate the rights, duties and liablities of a guardian. Can a guardian bind a minor on account of a wrong committed by him?

# BOOK III.

## The Law of Property.

### Preliminary Observations:

According to the scheme laid down at the outset, this book will treat of the Hindu Law of Property. Now, property may be **joint** or **separate.** And each of these two may be either *ancestral* or *self-acquired* which again may be *moveable* or *immoveable*. The orbit of right with reference to these classes and kinds of properties will vary according to the (1) *nature of the property* and (2) *character* or capacity *of* the *individual* holding that property. The rights and liabilities of persons dealing with those who dispose of such property will be determined mainly by reference to these two tests or marks. The following book, accordingly, will examine, the kind or kinds of properties under the Hindu Law, with the cognate subject of the Person or Persons affected by or concerned in these; and the incidents attached to these properties viz. the changes these properties undergo on Partition, Alienation or Assignment of the whole or specific portions therefrom; as also the Rights or Charges, *e.g.*, Maintenance, to which these are subject.

# CHAPTER VI.

## Joint Family.

**General:**—The term *joint family* has been borrowed from the language of English property law, according to which, " joint tenants are persons who own lands by a joint title, created expressly by one and the same deed or will. They hold uniformly *by purchase*. The estate must be of the same duration or nature, and quantity of interest. Joint tenants are seized *per my et per tout*, and each has the entire possession, as well of every parcel as of the whole. They have each an undivided share in the whole. In respect of his companion, a joint tenant is seised of the whole, but for purposes of alienation, and to forfeit, and to lose by default in a *proecipe*, he is the only owner of his undivided part or proportion. The doctrine of survivorship or *jus accrecesndi*, is the distinguishing incident of title by joint tenancy. According to this doctrine, the whole estate or interest held in joint tenancy, whether an estate in fee, or for life, or for years, or a personal chattel, passed to the last survivor, and vested in him absolutely. It passed to him free, and exempt from all charges made by the deceased co-tenant. The result is, that a joint tenant cannot devise his inteiest in the land".

Points of **Comparison and Contrast between joint tenancy and Hindu joint family.** *Comparison*:—(1) Every member has possession over the whole of the joint family property, and if one member dies, his right devolves upon the rest under certain limitations. This is the most distinctive feature of the principle of *Mitakshara* governing a joint family. It is called the *right of survivorship*—" a term unknown to the original texts". Still, this doctrine has proved a powerful engine in the development of the case-law on the subject of Hindu joint families.

(2) The estates held under both are of the same nature.

(3) The beneficial acts of one of them respecting the joint estate will enure equally to the advantage of all भ्रातृणामविभक्तानां यदुत्थानं भवेत्सहा । न पुत्रभागं विषमं पितादद्यात्कथंचन Manu IX 215. Compare also Yajnawalkya, who gives the following as an exception to the law of self-acquisition. सामान्यर्थसमुत्थाने विभागस्तु समः स्मृतः II 120.

(4) Joint Tenants are seized *per my et per tout*, and each has the entire possession, as well as of every parcel, as of the whole. This follows, as regards Hindu coparceners, from the very definition of partition given in Mitäkshara विभागो नाम द्रव्यसमुदायविषयाणामनेकस्वाम्यानां तदेकदेशेषु द्रव्यस्य व्यवस्थापनम् । II 8.

*Contrast*: (1) A joint tenancy can be created only by a deed or will while, the ownership of Hindu members arises by birth.

(2) To create the status of joint tenants,

(*a*) The title of the tenants must be under the same deed.

(*b*) the estate must vest in all simultaneously, and

(*c*) the interest of each must extend over the whole with equal intensity.

The interests of a Mitakshara joint family are similar in character, and extend over the whole. But in point of intensity they are not only unequal, but subject to constant fluctuations. See *Gurlingappa v. Nandappa*, 21 Bom. 797 per Farran C.J.

Moreover, (3) An English joint tenancy may be destroyed by partition, alienation or accession.

4. On the death of a joint tenant under the English Law, his widow cannot claim maintenance from the survivor.

*N. B.* An English coparcenary resembles the ownership under the Dayabhaga in many respects: There is no survivorship. The interest of each coparcener descends to his heirs who take *per stirpes*.

**Joint ownership and a Trading partnership:**—See Ss. 251 & 253 of the Indian contract Act. (IX of 1872)

"There is no analogy between the members of a joint Hindu family and those of a partnership:—(1) Each partner is the agent of the other, bound by his contract to protect and further the interests of his co-parceners unless relieved from that responsibility by an agreement. (2) And each partner is entitled to consume on his own account no more than his share of the partnership profits". (3) A partnership is dissolved by the death of a member. (4) Every member must attend diligently to the partnership business.

In a Hindu family (1) no obligation exists on any one member to stir a finger if he does not feel so disposed. either for his own benefit. or for that of the family: if he does do so, he gains thereby no advantage; if he does not do so, he incurs no responsibility. (2) Nor is any member restricted to the amount of the share which he is to enjoy prior to division. So long as the family remains united, the enjoyment of the family property is in the strictest sense common against each other. *Per Markby J. in Rungo Monee v. Kashi Nath*. 13 W.R. 75.

*N. B.*—The mere fact that some members of a joint Hindu family carry on a business would not give rise to any presumption that the

whole family is engaged in the partnership nor *vice versa.* There cannot be a partnership unless all or at any rate the three principal tests are satisfied.

According to the **Mitakshara doctrine, a son obtains ownership in the family property by birth.**

भूर्या पितामहोपात्ता निबंधो द्रव्यमेवच । तत्रस्यात्सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि ॥

Yajnavalkya, II. 121.

"The ownership of the father and the son is the same in land, which was acquired by the grandfather, or in corrody, or in chattels which belonged to him".

This theory of ownership by birth does not apply to *collateral* succession, but is only confined to the lineal one, thus necessitating a distinction between *obstructible* (सप्रतिबंध) and *unobstructible* (अप्रतिबंध) heritage. The succession of sons, grandsons and great grandsons is अप्रतिबंध cannot be obstructed, and is hence called unobstructible; and collateral succession is called *obstructible* (अप्रतिबंध) because it is सप्रतिबंध *i. e.* is likely to be obstructed by the birth or adoption of a son. This theory of origin by birth has one important advantage, in that it renders a partition possible, without ascertaining the dates of birth and death of every deceased owner of family property. According to this theory, the son obtains an interest in the property from the date of his birth, and thus becomes a co-owner with his father. But they are not co-sharers, the extent of their interests being subject to fluctuations by births and deaths: cf. the remarks in *Appovier v. Ram Subbayan*, 1 P.C.R. 657.

**Its advantage.**

These definitions of "obstructed" and "unobstructed" heritage refer in terms only to the property of a male. They do not apply to the "Stridhan" property. *Karuppai Nachiar v. Sankaranarayanan Chetty*, 27 Mad. 300.

Under the Dayabhaga, the sons's right in the father's property arises, not by birth, but, at the father's death. At that time, there being a vacancy, according to *Jimutawahana* each heir takes his estate in distinct shares, so that his share is known and vested before partition.

**The evolution of the Joint Family system:**—The unit of ancient societies was a family and the Indo Aryas were not an exception to this. Every family was governed by its own Patriarch. In India this Patriarchal system is found in the form of *gotras* or groups of persons connected with each other by tracing their descent to a common ancestor, after whom the family name was given to the group, and the persons described as belonging to that *gotra*. There were eight such principal gotras in the beginning, named and known after the seven original Patriarchs, or Rishis who came over to India from the regions which lie to the North West of India beyond the mountain chains, and together with their families or classes. The expression *Kulaguru* characteristically used with reference to the patriarch is expressive of the idea of a class or kula and its head or chief or *guru*. These gotras were themselves divided and subdivided into several divisions and each of these were known *generally* by the original head and *particularly* by the head or heads of the branches to which they belonged

The Hindu Joint family is thus a direct remnant of the patriarchal system known as the gotra. All the essential elements of a patriarchal group viz. (1) the supremacy of the eldest male (2) the agnatic kinship and the resulting law of inheritance and (3) the ancestor worship, are present in this system. And the Indian group has even more and additional characteristics which mark it off from other patriarchal groups viz. (4) the exclusion of women from the rights of inheritance, and (5) the gradual development of the joint family system.

Note:—A distinct departure was made first by *Vijnaneshwara* in (1) allowing females a distinct place in the line of inheritance and (2) so defining the word *Sapinda* as to make room, for cognates even to the exclusion of certain agnatic relations.

Composition of the Joint Family:— The family union seldom exceeds beyond seven generations. A Hindu Joint Family constituting a coparcenery, refers, not to the entire number of persons who can trace from a common ancestor and amongst whom no partition has taken place, but, only to those persons who, by virtue of relationship have the following rights, viz: the right (1) to enjoy and hold the joint family property, (2) to restrain the acts of each other in respect of it, (3) to burden it with their debts: and at their pleasure, (4) to enforce its partition.

**Who are its members.**

Its members do not succeed to each other. Their rights arise by birth, and are ascertained by partition. Until partition, their rights consist only in a common enjoyment of the common property to which is further added, in provinces governed by the *Mitakshara* the right of a male issue to forbid alienations by their ancestors.

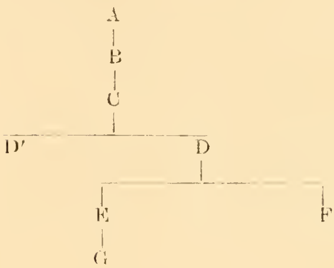
**Their characteristics.**

A coparcenery may be distinguished from a general body of the undivided family by inquiring, who are the persons who take an interest in the property by birth? They are those who offer the funeral cake to the owner of the property *i.e.* the three generations, next to the owner, in unbroken male descent.

This is always subject to the condition that no person who claims to take a share is more than three degrees removed from the direct ascendant who has taken a share. Wherever a breach of more than three degrees occurs between any holder of property and the person

who claims to take next after that holder, the line ceases in that direction, and the survivorship is confined to those collaterals and descendants who are within the limit of three degrees. But this coparcenery is not limited to three degrees from common ancestor. "The rule is not that a partition cannot be demanded by one more than four degrees removed from the original owner or acquirer of the property sought to be divided, but, that it cannot be demanded by one more than four degrees removed from the last owner, however remote he may be from the original owner thereof." (per Nanabhai Haridas J. at p. 465 and—see the observation of West J. in *Moro Vishwanath v. Ganesh Vithal*, 10 B.H.C.R. 444 at 448 *S. 99*.)

A few examples will make this clearer still, (see the judgment of *Nanabhai Haridas J.* in 10 B.H.C.R. at pages 462 to 465).




In the accompanying diagram, A is the original acquirer, and the persons B, C, D, D′, E, F and G are his direct lineal male descendants of several degrees:

Ex: I. A dies, and after him B and C die, leaving D and his sons E and F. E and F can demand partition, sons being equally interested with the father in ancestral property.

Ex: II. B and C predecease A who dies after them and D is the sole survivor. E and F born after A's death, can demand a partition from D.

Ex: III. B and C die, leaving A, D and D′; A dies leaving D and D′ who take jointly as survivors; D then dies, leaving two sons E and F. These and even G, the son of E, can sue D′ for partition of ancestral property.

Ex: IV. Under similar circumstances, A dies after D, leaving D′, and D's sons E and F. In this case, E and F cannot sue D′ for partition of property descending from A, because it is inherited by D′ alone, the right of representation extending no further.

*N. B.*—These cases are illustrated by a simple example. The introduction of collaterals to B. C. K. would render the case a little complicate as regards the share of each claimant, but it would not affect the rights of parties.

✓II. **Coparcenery Property:**—This may be either, (A) Ancestral Property or (B) Property jointly acquired or (C) Property thrown into common stock or lastly (D) Impartible Property.

**A.** Ancestral Property:

भूर्या पितामहोपात्ता निवन्धो द्रव्यमेवच । तत्र स्यात्सदृशं स्वाम्यं पितुःपुत्रस्य चैव हि ॥

याज्ञवल्क्यः २. १२१.

"The ownership of a father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels". Yajnavalkya II. 121.

**What is?**

And generally, property is ancestral, if it has been inherited as unobstructible property. All property inherited or taken by birth, survivorship or partition from a direct male ancestor not exceeding three degrees higher than himself is ancestral and is held at once in coparcenery with his own issue.

**What is not?**

Whereas, property inherited as obstructed *i.e.* (1) from a collateral relation, is not ancestral; so also property inherited (2) from or through a female or (3) from an ancestor more than four degrees remote, would not be ancestral. Note: that which is ancestral as regards his own issue, is not so as regards collaterals. For, they have no interest in it by birth.

All savings made out of ancestral property, and all purchases or profits made from the income or sale of ancestral property, would follow the character of the fund from which they proceeded.

But, where the aid is very remote and the acquisition is made chiefly by the father's own ability and exertions, the property is treated as his separate acquisition. *Jugmohandas v. Mangaldas*, 10 Bom. 528. Property purchased with money borrowed on the security of ancestral property, is ancestral property. *Sheoprasad v. Kullundar*, 1 Sel. Report 76, 101. If the common estate is improved, it still continues to be ancestral. *Shib Dyal v. Jadu Nath Tewaree*, 9 W.R. 61. Moveable property which has made a descent, and is then converted into land,

possesses all the incidents of ancestral immoveable property. *Sham Narain v. Raghubar Dayal*, 3 Cal. 508. Property given to the father by his father is, according to the Calcutta and Madras High Courts, ancestral property in his lands. According to the Bombay High Court, the self-acquired property of a person, if left by his will to his son, does not become ancestral in the hands of the son. *Jugmohandas v. Mangaldas*, 10 Bom. 528.

Where a man obtained a share of the family property on partition, which was mortgaged to its full value, and which he had subsequently cleared from the mortgage by separately acquired funds, it was held that the unencumbered property was ancestral property. *Visalatchee v. Annasami*, 5 Mad. H.C.R. 250.

But after partition each share becomes the acquisition of each individual holder to whom it is allotted, and any specific encumbrance upon it, before partition if uuauthorized. will not go wtih it, after partition. In a case, where an undivided share was mortgaged, before partition, by a member, and upon partition that specific share fell to the lot of another member, it was held by the Allahabad High Court that the mortgagee could not proceed against that portion, but that he was at liberty to follow the share assigned to his mortgagor. *Amolak Ram v. Chandan Singh* 24, All. 483.

A father with his two sons A and B had self-acquired property. A died in his life-time leaving a widow, and upon his death, B took the property. A's widow claimed maintenance out of it as ancestral property. Held, per Mahmood J. (admitting that between B and his sons it would be ancestral property but), that it was not so, as regards A. As regards A. it was neither ancestral nor coparcenery property and on his death, his widow had no higher claims over it than her husband. During the father's life-time, it was not in any sense ancestral. and the sons had no co-parcenery interest in it, but merely the contingent interest of taking it on their father's death intestate. In this case, plaintiff's husband having predeceased his father, such interest never became vested. (*Adibai v. Karsandas*, 11 Bom. 199 dissented from). *Janki v. Nandram*, 11 All. 194.

**Nibandha:** Among coparcenery property are given lands. moveables; but there is another kind of property which, being ancestral, is coparcenery, and that is *Nibandha*.

**What is Nibandha?**

*Vijnaneshwara* does not give any definition. He describes it as follows: एकस्य पर्णभारकस्य इयन्ति पर्णानि । तथा एकस्य क्रमुकफलभारकस्य इयन्ति क्रमुकफलानीति । *i. e.*, "so many leaves receivable from a plantation of betel pepper, or so many nuts from an orchard of areca". According to the *Viramitrodaya* it is a kind of "*vritti*" or "sustenance" granted by kings and recorded in the *Shasana* or royal grants in writing. But whether this allowance was a charge upon any specific immoveable or whether it was payable in cash from the Royal treasury is not made

**Its nature.**

clear there. The Bengal writers (Jimuta Wahana and particularly *Shrikrishna*) explain it as "anything which has been *promised*, deliverable annually, or monthly or at any other fixed time." Here also it is not associated with any land or other immoveable. Macnaghten, however, in his Hindu Law, says:—" Hindu Law classes amongst things immoveable, property which is of an opposite nature, such as slaves and corrodies or assignments on lands. From the explanation appended to the word by *Vijnaneshwara* there is some approach to an indication that he meant to associate it with land. This is also the view of *Jimuta Vahana*. Thus "*nibandha*" is supposed to be a kind of property having something to do with land. The importance of the question whether "*nibandha*" is an immoveable, or has any connection with land, will be seen in determining the validity or otherwise of its alienation by a qualified holder *e.g.*, a widow, a manager in a joint family &c.

Some approach to a solution of this question was made in the *Collector of Thana v. Hari Sitaram*, 6 Bom. 546, where the property was certain grants by money payment made by the Mahratta Government to a particular divinity. The "Sanad" directed that the payments were to be made out of certain specified "mahals and forts" subject to the Mahratta Government. Upon these facts, the Court remarked:—The Hindu authorities, which we have quoted, seem to show that a pension or other periodical payment or allowance granted in permanance is "*nibandha*" whether secured on land or not........We are unanimous in holding that the grant made by the sanad here is "*nibandha*", and that......We are bound to regard it as immoveable property or an interest in immoveable property within the scope of S. 1 Cl. 12 of Act IV of 1859".

**B. Property jointly acquired:** although not ancestral, may be joint. Whether the issue of joint acquirers would, by birth alone, acquire an interest in such property without evidence that they had, in any way, contributed to it is an open question. From the following case it would appear that they can.

Where a father and a son possessed of no ancestral estate acquired a property by their joint exertions, the son's share in such property, is self-acquired in his hands. But the share of the father which devolves on the son either by survivorship or by inheritance, becomes, in the hands of the son, ancestral property. *Chatterbhooj v. Dharamsi*, 9 Bom. 438.

But, property inherited by brothers from their maternal grandfather is not held by them as joint-tenants, and on the death of one of them, does not pass by survivorship to the rest. *Jussoda Koer v. Sheo Prasad*, 17 Cal. 33.

And generally, the principle of joint tenancy is unknown to Hindu law, except in the case of a coparcenary between members of an undivided family. *Jagesrar Narain v. Ramchandra Dutt*: 23

Cal. 670; 23 I.A. 44; *Navroji v. Perozbai*, 23 Bom. 80. And, among Hindus, when property is given to two persons jointly, there is no presumption that the donor intended to annex the condition of survivorship which might have the effect of excluding the sons of one of the donees. *Hirabai v. Lakshmibai*, 11 Bom. 573.

Following these decisions, it was held, that where property is given jointly to two persons who were members of a joint family, each donee takes an interest in the property, which passes to his heirs and not the other donee by survivorship. In this case two brothers were joint donees: one of them dying, his widow was held entitled to his share and not his surviving brother. *Bai Diwali v. Patel Bechardas*, 26 Bom. 445.

**C. Property, thrown into common stock,** becomes joint, if thrown with the intention of abandoning all separate claims. *e.g.* where property which was held to be self-acquired in the case I.L.R. 10 Bom. at 568, was made ancestral by an agreement. It was held that the effect of the agreement was to make the property ancestral as between the parties to the agreement: and that even all the accumalations and accretions to the property in question subsequent to the agreement were ancestral. Per Farran C.J. & Strachey J. in *Tribhorandas Mangal Das v. Yorke Smith*, 21 Bom. 349.

But where such separate acquisition is not thrown into the common stock, nor treated as joint property, it would go to the heirs by inheritance and not by survivorship. *Santan v. Janku*, P. J. 93 p. 290. *Chanbasapa v. Cholara*, P. J. 90, P. 172 at 173.

**D.** Lastly, property, though impartible, may still be joint.

III. **Self acquisition and the burden of proof when it is set up.**— The law as to this is based upon the following text of Yajnawalkya Ch. II.

पितृद्रव्याविरोधेन यदन्यत्स्वयमर्जितम् । मैत्रमौद्वाहिकं चैव दायादानां न तद्भवेत् ॥११८॥
क्रमादभ्यागतं द्रव्यं हृतमभ्युद्धरेत्तु यः । दायादेभ्यो न तद्दद्याद्विद्यया लब्धमेव च ॥ ११९ ॥

*i.e.*" whatever is acquired by the coparcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs (118): nor shall he who recovers hereditary property which has been taken away, give it up to the coparceners: nor what has been gained by science. (119)."

*Vijnaneshwara* explains the passage thus:

(1) The word *Pitri* (पितृ) includes mother (or any undivided coheir *Smritichandrika*): hence, the Madras High Court has held, that property inherited by a man from his mother's father, is not his self-acquisition. *Muttayan Chetti v. Sangili*, 3 Mad. 370.

(2) The expression पितृद्रव्याविरोधेन "without detriment to the estate of the father" must be taken as the predicate of every variety of estate specified in the two verses.

Four **kinds of** self-acquisitions are indicated here: viz: (1) gifts from friends (2) nuptial presents (3) ancestral property lost and recovered and (4) gains of science, all subject to the qualifications that they were obtained "without detriment to the patrimony." Of these in details.

**Gains of science.** विद्यालब्ध: Whenever gains of science are referred to as having been imparted at the family expense, it is intended that the special branch of science which is the immediate source of the gains, is meant, and not the elementary education which is the necessary stepping stone to the acquistion of all science. *Lakshman v. Jamnabai*, 6 Bom. 225, approved in *Krishnaji Mahader v. Moro Mahader*, 15 Bom. 32, followed in *Lachmin Kuar v. Debi Prasad*, 20 All. 435.

Property acquired with the income derived from prostitution is the self-acquisition of a dancing girl who has received the ordinary education in dancing and music. *Boologam v. Swornam*, 4 Mad. 330. In Madras a Vakil's gains were held not to be gains of science. *Durrasulu Gandharudu v. D. Narasammah*, 7 Mad. 47. But contra in Bombay. See the remand judgment in *Bhagirithibai v. Sadashivrao*, P. J., 80, P. 126.

**Government grants**: Estates conferred by Government in the exercise of the sovereign power, become the self-acquired property of the donee whether such gifts are absolutely new grants or only the restoration, to one member of the family, of property previously held by another, but confiscated: unless some contrary intention appears from the grant. *Sri Mahant Govind Rao v. Sita Ram*. 21 All. 53; 25 I.A. 198. The case, however, would be otherwise, where there has been forcible dispossession of one member by another: or a wholesale confiscation by Government and a subsequent annulment thereof by them. (*Mirza Jehan v. Badshoo Bahoo*, 12 I.A. 124; 12 Cal. 1): or where the grant to one member only is simply for ascertaining the state claim for Revenue. *Narayana v. Changalamma*, 10 Mad. 1.

**Savings from impartible property** are the absolute and exclusive property of the possessor of Zemindary for the time being. But, savings inherited follow a different rule: they would become the joint property of descendants.

**Recovery of ancestral property:** "हृताभ्युद्धरण":—Ancestral property, recovered by one coparcener, in order to be his self-acquisition, must satisfy the following conditions:—viz: (1) the property must have been held by strangers and adversely to the family (2) the person holding it, must not claim title to hold it as a member of the family or as a stranger claiming under the family *e.g.* a mortgagee (3) the other coparceners must be negligent or acquiescent (4) the recovery must be made *bona fide* and not in fraud of the co-heir's title (5) It must be an actual recovery of possession and not merely the obtaining of a decree for possession (6) it must be made without any assistance from the family funds: So where a father had himself acquired immoveable property in the form of certain *Malikana* allowance and also other property which was previously encumbered, by redeeming it, it was held that the whole of this property was his self-acquisition. *Balwant Singh v. Rani Kishori.* 20 All. 267; 25 I.A. 54.

**Result to the acquirer:**— As to this, according to *Mitakshara* the recoverer got sometimes a fourth and sometimes the whole "if it be land, he takes one-fourth, and the remainder is shared equally among all the brethren." Where the latter rule is applied, he takes one-fourth first, and then shares equally with the others in residue.

**Acquisitions aided by joint funds** stand midway between self-acquired and joint property. According to *Vasistha*, such acquisitions are liable to partition, the acquirer being entitled to a double share. The aid from joint funds must be very slight: otherwise no preference will be due to him.

A distinct property acquired by a member of a joint family with but slight aid from joint funds, is liable to partition but the acquirer takes a double share. *Sri Narain v. Guru Prasad*, 6 W.R. 219.

**Burden of Proof and Presumptions:** The Normal state of every Hindu family is joint. And such will be the legal presumption, unless the contrary is proved; and the presumption is that the family is joint in food, worship and estate. *Neel Kristo Das v. Beer Chunder Thacoor*, 12 Moore's I.A. 523.

Where a family (1) lives in commensality, (2) eats together, and (3) possesses joint property, it is to be presumed that all property in their possession is joint; and, further, that purchases made in the name of one member are made for the property; *Dhurm Das Panday v. Shama Sundari Dasi*, 3 Moore's I.A. 229; *Jamnodas v. Allu Marrin*, 19 Bom. 338. A family once joint, retains the joint condition unless a division is proved. But the members of any family may sever in all or any of the three things.

But this presumption of union is a rebuttable presumption.

It may be shown that the nucleus of the purchase money did not come from the joint funds, that the property is held separately, though the family lived in the same mess; and that the member purchased it in his own name, with title deeds in his name, and not as a manager or trustee.

"The absence of any nucleus of joint property is a factor of considerable importance in determining as a question of fact whether or not the property gained by each co-parcener was his self-acquisition. The mere fact that the family is joint does not raise the presumption that the property acquired by the members of the family is joint in the absence of family property". *Per Jenkin C. J. in Bhagubai v. Tukaram*, 7 Bom. L.R. 169.

When it is admitted or proved that the property in dispute was not acquired by the use of patrimonial funds, the party alleging such proof must prove it. So too where partition is admitted or proved. *Narayan Babaji v. Nana Munohar*, 7 Bom. H.C. R. 155.

The mere fact that the members of a family live and have their meals together would not preclude any one of them from setting up a self-acquisition, if it was really and technically so. And it has been held that, members may be regarded as joint for some, and separate for other, items of property. In short, the burden will vary according to the nature of each case.

This presumption of law that all acquisitions, made while the property remained joint, accrue to swell the joint funds, does not apply to the case of a joint family governed by the Dayabhaga. *Sarada Prasad Ray v. Mahananda Ray*, 31 Cal. 448.

V. and his five sons constituted an undivided Hindu family. V. and his three elder sons lived apart from the two youngest sons, and were in possession of some ancestral property. The two youngest sons were plaintiff and first defendant respectively in this suit. Plaintiff sued this brother for an account of certain property alleged to be the property of a joint family consisting of the first defendant and himself. Plaintiff alleged that the property was acquired in a business, for which though there was no express agreement, he prayed that its existence may be inferred. Held, that it was impossible to regard plaintiff and first defendant as forming in themselves a joint family owing corporate property. *Sudarsanam v. Narasimhalu*, 25 Mad. 149. (Note the observation of Bhashyam Ayyangar J.).

IV. **Enjoyment of the family property.** The members of an undivided family may be said rather to have rights out of the property than rights to the property. No individual nember can predicate of the joint and undivided property, that he, that particular member has a certain definite share. The members cannot call for an account except as incident to their right of partition. *Ganpat v. Annaji*, 23 Bom. 144.

**Position of Manager:** The Manager of a Hindu family holds a position in relation to the other members of the family, peculiar to himself and not precisely analogous to anything known in English law. He is not an agent of the other members of the family. *Mahammad Askari v. Radhe Ram*, 22 All. 307. Unless such a relation is specially created by any express or implied agreement between the parties. *Sethracharlu Ramabadra v. S. Virabadra Suryanarayana*, 22 Mad. 470: 26 I.A. 167. His position is that of a *trustee* and *cestui que trust* rather than of an agent or a partner. *Annamalai Chetti v. Murugesa Chetty*, 26 Mad. 544 (**P.C.**). In the absence of an express agreement, he is entitled to no remuneration, he being a joint owner of the property along with others. *Krishnasami v. Rajagopalu*, 18 Mad. 73. So long as he administers for the family, he is under no obligation to economise or save as would be the case with a paid agent or trustee. Upon a partition, the accounts must be taken upon the footing of what has been spent and what remains, and not upon the footing what might have been spent, if frugality and skill had been employed. *Vithoba v. Govind. P. J.* '90, P. 322.

He is, however, to make good whatever sums he has actually misappropriated or which he has spent for purposes other than those in which the joint family was interested. He cannot refuse to render accounts, when he is required to do so by any member at the time of partition. *Ganpat v. Antaji*, 23 Bom. 144. What the account must be, and what objections the other party can take to it, must depend upon the conduct of the manager and the circumstances of the family. Members who are minors can, in a partition suit, ask for accounts: and as they cannot be taken to have given their consent to the management, they can, when they attain majority, hold the manager liable, not only for acts amounting to fraud, but also where the management has been grossly negligent and prejudicial to their interest, the presumption, however, being, that, in the absence of evidence, the property for partition is such as it exists at the time of the suit for partition. *Damodardas v. Uttamram*, 17 Bom. 271.

Nor in a partition suit, will his share be burdened with the liabilities of his guardian, merely because the guardian committed defalcations in respect of the joint property, unless it is shown that he has derived any benefit therefrom. *Sonu v. Dhondu*, 28 Bom. 331.

And a decree obtained against a manager without joining the minor members through a guardian as defendants, will not bind them; and a suit may lie by the minors for a declaration that their interests were not affected by the proceedings. *Vishnu Keshav v. Ramchandra*, 11 Bom. 130; *Daji Hanmant v. Dhirajram*, 12 Bom.18; *Sham Lal v. Ghasita*, 23 All. 459. The general right which sons have, of disputing a transaction with or against the father, also accrues to the benefit of the minor.

Where one member has been entirely excluded from the enjoyment of the property, or where it has been held by a member of the family who claimed it as impartible, mesne profits may be allowed in such cases, though as a rule, mesne profits are not allowed. *Bhirrao v. Shitatom*, 19 Bom. 532.

**Powers of a manager:**—A manager of a Hindu family has nearly the same rights with regard to the members of the family, as a father has, subject, however, to slight modifications here and there. He can dispose of the property for all purposes, which are either beneficial to the family and to the interest of the members, and not to their disadvantage, or are necessary, with the concurrance of such of them, as are majors. He can refer a suit to arbitration, and bind other members thereby. *Jagannath v. Mannu Lal*, 16 All. 231. He can give a a fresh start of Limitation to a debt which is not time-barred. *Annapagauda v. Sagadiyappa*, 26 Bom. 221 (F.B.). But he cannot revive a barred debt. *Dinkar v. Appaji*, 20 Bom. 155.

**Right to sue alone or jointly**:—A necessary consequence of the corporate character of the family holding is, that, wherever any transaction affects the property, all the members must be privy to it: and whatever is done, must be done for the benefit of all and not of any single individual. Thus, a single member cannot sue or proceed by way of execution-proceedings to recover a particular portion of the family property for himself whether this claim is preferred against a stranger who is asserted to be wrongfully in possession or against his copareners. If the former, all the members must join, and the suit must be to recover the whole property for the benefit of all. If it is against the coparcener, it is vicious at its root. The same rule forbids one of several sharers to sue alone for the ejectment of a tenant, or for enhancement of rent, or for his share of the rent, even with the consent of the other

sharers. *Balkrishna v. Moro*, 21 Bom. 154. *Jas Ram v. Sher Singh*, 25 All. 162 (and cases cited therein). And where such a member was not joined, it was held that the decree did not bind him. *Krishna Reddi v. Thambu Reddi*, 26 mad. 28. In *Gururayya v. Dattatraya*, 28 Bom. 11, the Bombay High Court held that the joinder of parties was a question of convenience and capacity. If joining the parties was essentially necessary so that, without that, no effective decree could be passed, then the non-joinder will naturally affect. This objection must be taken at an earlier stage of the suit.

**Rights of coparceners** *inter se:* The right of a member consists simply in a general right to have the property fairly managed in such a manner as to enable himself and his family to be suitably maintained out of its proceeds. Under the *Mitakshara* law members hold as joint tenants : under the *Bengal* law, they hold as tenants-in-common.

**Examination : Short Summary :** Under the Hindu Law, property may be joint, separate, ancestral, self-acquired, moveable or immoveable. But the joint Hindu family must not be confounded with the joint-tenancy of the English Law, according to which there is no provision for the widows of the deceased joint-holder; and it can only be created by a deed. Under the *Mitakshara* every member obtains an ownership in the family property by birth. The family union seldom goes beyond seven degrees. Its members are those born from a common ancestor, and have the right (1) to hold the joint family property, (2) to restrain the acts of each other,* (3) to burden the property with their debts and (4) to enforce its partition. They do not succeed to each other. Their rights arise by birth, but are definitely ascertained only by partition, and this is the important test of distinguishing a coparcenery from an undivided family. The coparceners are those who are not more than three degrees removed from the last lived male holder, and coparcenery property is either, ancestral, jointly acquired, or separately acquired and thrown into common Stock, and Impartible property. Property which is ancestral, may be moveable or immoveable or a mere right or interest in immoveable property *e.g. a nibandha* or corrody. But property which is acquired without detriment to the patrimonial estate is not ancestral, but self-acquired whether it is received as a friendly or bridal gift, or is property once belonging to the family, but being lost, was recovered by the acquirer, or whether it is a pure gain of science. In all these cases, the general presumption of Hindu Law being that a family is joint, the

burden of proving self-acquisition lies upon those who assert it. The property is enjoyed in common; one person, who is generally the senior member, acts as the manager. He is however, not the agent, of others. His position is that of a trustee. He has a special duty by minor members of the family, who have a certain lattitude in questioning, upon attaining majority, his acts, during their minority. Whether a manager may sue alone or together with all is a question of expediency, determinable by the exigencies of each case.

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QUESTIONS : 1. What kinds of property are known to Hindu Law? Under which of these categories would you include *Nibandha ?* Explain clearly what is meant by *nibandha.*

2. Define a 'coparcenery' and explain clearly what is meant by coparcenery property. What is ancestral property ?

3. Define self-acquisition and mention the ways in which it may be obtained. What is the position of an acquirer in a joint Hindu Family ? What is the position of a Manager in a joint Hindu Family ? Have the minor members any special privilege?

POINTS TO BE SPECIALLY NOTED : (1) Persons merely by living in union do not become coparceners, (2) the three degrees to be measured are as far as the last *living* acquirer or holder, (3) a manager is not an agent but a trustee.

# CHAPTER VII.

## Debts.

**Generally**: One of the privileges of a member of a joint Hindu family is his right of burdening the property with his debts. Now to what extent this can be done has to be determined by reference to his interest in the whole property, and also by the *character* of the debt. The capacity of the person, contracting the debt as a father, manager or an ordinary member, will be the most important point for consideration in determining the character and extent of the liability.

This liability is created by several **duties** imposd upon persons.

The chief among these are **three**: viz.

(1) The **Religious** duty of discharging the debtor from hell:

(2) The **Moral** duty of paying a debt contracted by one, whose assets have passed into the possession of another.

(3) The **Legal** duty of paying a debt contracted by one person as the agent, or privy in blood or interest, of another.

I. The Religious Duty:—The Smritis have devoted a whole chapter to the subject of *Debts* as an independant branch of the *Vyawahara* or Positive Law viz. ऋणादान (Recovery of debts). In this chapter, are specified the several duties indicated above. The religious duty attaches to the sons and grandsons but not to great-grandsons or persons onwards as will be seen from the following quotation from Brihaspati (बृहस्पतिः)

ऋणमात्मीयवत्पित्र्यं पुत्रैर्देयं विभावितम् । पैतामहं समं देयं न देयं तत्सुतस्य तत् ॥

The general duty lâid down in Yajnavalkya II. 50 and especially by

बृहस्पति in अतः पुत्रेण जातेन स्वार्थमुत्सृज्य यत्नतः । ऋणात्पिता मोचनीयो यथा न नरकं व्रजेत्॥

According to these and other texts, it is a legal as well as a sacred obligation upon the **son** to pay his father's debts **with interest**, and for the **grandson**, those of the grand-father but **without interest**, whether they received assets or not.

Now however, in all provinces, the heir is only liable to the extent of the assets he has inherited from the person whose debts he is called on to pay. *Raj Rup Singh v. Baldeo Singh*. 2 W.R. 238.

In **Bombay**, however, the stricter rule was applied and the son or grandson was held liable, as above, even when he received no assets. Now, however, this hardship has been removed by Bombay Act VII of 1866 (Hindu's Liability for ancestor's debts), under which, a Hindu heir will be liable as representative of the deceased ancestor, only to the extent of the assets received, and that he shall be personally liable only in respect of assets received and not duly applied by him. S. 2. *Sakharam v. Govind*, 10 B.H.C.R. 361; *Udaram v. Ranu*, 11 Bom. H. C.R. 76.

But even then, in Bombay, there is nothing that would debar a creditor in *obtaining* a decree against a son, even when there are no assets. The decree cannot be *executed*, however, unless there are assets. *Lallu Bhagwan v. Tribhowan Motiram*, 13 Bom. 653.

Under the *Mitakshara* a son is bound to pay a time-barred debt revived by the father: *Narayan Sami v. Sami Das*, 8 Madr. 293. See also *Tilakchand v. Jitamal*, 10 B.H.C.R. 206/214.

The **Son is not bound to pay** his father's debts when

(*a*) The debt is of an **immoral** character. *Chintamanrao v. Kashinath*, 14 Bom. 320 : *Joharmal v. Eknath*, 24 Bom. 343.

(*b*) The liability of the father is under an act which is in itself a **criminal offence** *e.g.* "theft" or "Criminal misappropriation" of property. *Mahabir Prasad v. Basdeo Singh*, 6 All. 234 : *Pareman Dass v. Bhatta Mahton*, 24 Cal.672: *Mc.Dowell & Co. v. Ragava Chetty*, 27 Mad. 71. (distinguishing 16 Mad. 99.).

(*c*) The debt is of a ready-money character.

(*d*) The son is separated from his father. *Trimbak v. Narayan*, 8 Bom. 481: Cf. *Krishnasami v. Ramasami*, 22 Mad. 519 (Debt before partition: personal decree against father—son held not liable).

(*e*) The property came to the son by a gift from the father. *Tilak Chand v. Jitamal Sudaram*, 10 B.H.C.R. 206 214. *Gurusami v. Chinnamannar*, 5 Mad. 37.

(*f*) The debt is created under a perpetual liability incurred by the father *e.g.* an agreement to pay Rs 10—8—0 per year for the use of temple, in consideration of an existing debt. *Balkrishna Ramchandra v. Janardan Vishnu*, 6 Bom. L.R. 642.

**Father's liability as surety:**— Under the strict letter of the Hindu Law, a son is not liable to pay a debt incurred by a father (among other things) as a surety nor is a father liable for a similar liability of the son. See Yajnavalkya II. 47 Do: Apararka; Narada, IV. 10.*

"This text occurs in the context where it is classed along with other extravagant acts of the father. It would not be safe to understand from it that the exception made for the father's surety liability is to be literally applied; for this the special provision for surety will have to be resorted to" Per Ranade J. in *Tukarambhet v. Gangaram*, 23 Bom. 454; and it has now been established that a son is liable for a debt incurred as surety by the father. 23 Bom. 454; *Sitaramayya v. Venkataramanna*, 11 Mad. 373; *The Maharajah of Benares v. Ram Kumar Misser*. 26 All. 611.

But the same liability does **not** attach to a **grandson** with reference to a debt of his grand—father: *Narayan v. Venkatacharya*, 28 Bom. 408; 5 B.L.R. 434.

*N. B.*—The exemption which a son can claim from liability for the father's debt, has reference to the nature of the *debt*; and not to the nature of the *estate* affected thereby. The liability would equally attach to any kind of estate, whether ancestral or acquired taken from the creator of the debt. *Hunooman Pershad v. Mt: Baboee*, 6 M.I.A. 426.

*Proof of Assets:*—Plaintiff must establish facts as would *prima facie* afford reasonable grounds for an inference that assets had or ought to have come to the hands of the defendant, *Krishnaya v. Chinaya*. 7 Mad. 597. The mere fact of an heir certificate having been taken out is not even *prima facie* evidence of the possession of the assets.

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* न पुत्रर्णं पिता दद्याद्द्यात्पुत्रस्तु पैतृकम् । कामक्रोधसुराद्यतप्रातिभाव्यकृतं विना ॥

**Time, when liability accrues to son, even when father alive.**

It was for some time supposed and held that the liability accrued due to the son after the father's death, whether natural or civil, *i.e.* when he becomes an anchorite, or has been absent for 20 years, or is immersed in vice, insolvency &c., or is suffering from some incurable disease, or is mad, or extremely aged.

This pious obligation exists whether the father be dead or alive. The mere fact that the father is alive does not absolve the son from his liability and enable him to obstruct the execution of the decree against the family property, *Govind Krishna v. Sakharam Narayen*, 28 Bom. 383: 6 B.L.R. 344: *Ramchandra v. Fákirappa*, 2 Bom. L.R. 450: *Chidambara Mudaliar v. Koothaperumal*, 27 Mad. 326. It is not limited to the father's interest in the property, but extends to the whole estate in his hands for all the debts, which though neither necessary, nor for a beneficial purpose, are not for an illegal or immoral purpose. *Muttayan Chetti v. Sangili*, 9 I.A. 128; 3 Mad. 370; *Joharmal v. Eknath*, 1 Bom. L.R. 839; *Lala Suraj Prasad v. Golab Chand*, 28 Cal. 517; *Debi Dut v. Jadu Rai*, 24 All. 459; and 27 Madras 326: *(Ubi Supra)*, even though the decree be against the father personally. *Karan Singh v. Bhup Singh*, 27 All. 16 (overruling *Ram Dyal v. Durga Singh*, 12 All. 209.)

**Creditor's position:** What is the position of a creditor of the Father *in re*: a debt validly contracted by the father: and the rights and liabilities of sons in regard to these when they were or were not made parties to the suits or execution-proceedings, is a question of a very complicated character and has received consideration in several cases in India and in England. The following is a short summary suggested by Mr. Mayne in his Hindu Law. ( See also the judgment of *Batty J.* in *Joharmal v. Eknath*, 3 Bom. L.R. 322 at p. 358.

I. In cases governed by *Mitakshara* law, a father may sell or mortgage, not only his own share in the family property in order to satisfy an antecedent debt of his own, not being of an illegal or immoral character; but such transactions may be enforced against his sons by a suit, and by proceedings in execution to which they are no parties. *Girdharee Lal v. Kuntoo Lal*, 1 I. A. 321; *Debi Singh v. Jia Ram*, 25 All. 214 (**F.B.**); *Periasamy Mudaliar v. Seetharama Chettiar*, 27 Mad. 243 (**F.B.**)

II. The mere fact that the father might have transferred his son's interest affords no presumption that he has done so, and that those who assert that he has done so, must make out, not only, that the words in the conveyance are capable of passing the larger interest, but that they are such words as a purchaser who intended to bargain for such a larger interest might be reasonably expected to require. *Shambhu Nath v. Gulab Singh*, 14 I. A. 77; *Sakharam v. Sitaram*, 11 Bom. 42.

III. A creditor may enforce payment of the personal debt of a father not being illegal or immoral, by seizure and sale of the entire interest of father and sons in the family property, and it is not absolutely necessary that the sons should be parties either to the suit itself or to the proceedings in execution. *Mudden Thakoor v. Kantoo Lal*, 1 I.A. 321; *Nanomi Babuassin v. Mudden Mohan*, 13 I.A. 1; *Uman Hath Sing v. Goman*, 20 Bom. 385; *Abdul Aziz v. Appayasami Naiker*, 22 Mad. 110; *Deoji v. Shambhu*, 24 Bom. 135. *Karan Singh v. Bhup Singh*, 27 All. 16 **(F.B.)**

IV. It will not be assumed that a creditor intends to exact payment for a personal debt of the father by execution against the interest of the son, unless, such intention appears (1) from the form of the suit or (2) of the execution-proceedings, or (3) from the description of the property put up for sale; and the fact that the sons have not been made parties to the execution-proceedings is a material element in considering whether the creditor aimed at larger, or was willing to limit himself to the minor, remedy. *Deen Dyal v. Jugdeep Narain*, 4 I. A. 247; *Hurdey Narain v. Rooder Perkash*, 12 Beng. L.R. 101, *Joharmal v. Eknath*, 3 Bom. L.R. 222.

It is a pure question of facts and will have to be determined upon the exigencies of each particular case. *Kunjan Chetty v. Sidda Pillai*, 22 Mad. 61; and in the absence of circumstances, showing an intention to put off to sale the entire family estate, only the father's interest passes to the auction purchaser. *Manohar v. Balwant*, 3 Bom. L. R. 97; *Lala Surju Prasad v. Gulab Singh*, 27 Cal. 724: 28 Cal. 517.

V. The words, right, title and interest of the judgment debtor, may either mean the share which he would have obtained on a partition, or the amount which he might have sold to satisfy his debt.

VI. It is in each case, a mixed question of law and fact to determine what the court intended to sell at public auction, and what the purchasers expected to buy. The Court cannot sell more than the law allows. If it appears as a fact that the court intended to sell less than it might or even ought to have sold, and that this was known to the purchasers, no more will pass than what was in fact offered for sale.

The position of a purchaser at Execution sale, when sons set up immorality: Note the following cases:—

*Girdharee Lal v. Kuntoo Lal: Mudun Thakoor v. Kuntoo Lal.* 1 I.A. 321: *Suraj Bansi v. Sheo Pershad.* 6 I. A. 88.

**The ruliug of the Privy Council** in the case of *Girdharee Lal* that a purchaser in execution of a decree against father, being a stranger to the family, and a *bona fide* purchaser for value, is not bound to go beyond the decree, and to see whether the debt for which the sale took place was for proper or improper purposes, (the decree being conclusive on the point). is qualified by the case of *Suraj Bansi Koer v. Sheo Pershad* 6. I. A. 88 that when at or before the execution sale, a notice on the part of the sons is given, intimating their rights in the property about to be sold and declaring the debt as an immoral one, the purchaser could not claim the protection of a "*bona fide* purchaser for value."

Both these cases have often and often been referred to, discussed and followed in all the High courts on a number of occasions. The following few may be noted. *Ponnappa v. Pappurayyangar.* 4 Mad. 1 (**F.B.**) and 9 Mad. 343 (**F.B.**) *Dharam Singh v. Angan Lal,* 21 All. 301: *Lala Surju Pershad v. Golab Chand.* 27 Cal. 724: 28 Cal. 517: *Joharmal v. Eknath.* 24 Bom. 343.

In 4 Mad. 1; *(Poppanna v. Popparayyangar)* it was held that the obligatiou of the son to pay his father's debts being a part of the law of inheritance and not contract, it does not arise until the father's death; it is the duty of the father to pay over his debts. But the decision goes further in holding that even in the father's life-time, where there has been a decree against the father for debts which were neither illegal or immoral, and ancestral immoveable property has been sold in execution of the decree, the sons cannot recover from a *bona fide* purchaser for value. But this ruling was much modified by a subsequent F. Bench of the same court in the same matter in 9 Mad. 343 and now it stands overruled by *Nanomi Babusin v. Modun Mohun*, 13 I. A. 1; 13 Cal. 21.

**Purchaser cannot ask for a refund**—where it has been proved that the son's interest in the property was absolutely unaffected by the

proceedings against the father, a purchaser of the property in execution against the father has no right in Equity for a refund of the purchase-money. *Virabhadra Gouda v. Gururenkata Charlu*, 22 Mad. 312.

**Father's unsecured debts not a charge:** It is not to be supposed, that, after the death of the father, his unsecured debts become a charge on his estate, so as to entitle the creditor to follow it in the hands of a *bona fide* purchaser for value. Notwithstanding the existence of ancestral debts, the sons may dispose of his estate and convey a good title to the purchaser. *Jamiat Ram v. Parbhu Das*, 9 Bom. H.C.R. 116; *Luxman v. Sarasvatibai*, 12 Bom. H. C. R. 98 unless such creditor shows that the purchaser had knowledge of the debts or of the intention of his vendor to apply the money otherwise than in payment off of the debts. Excepting these two cases a purchaser obtains a good title and he is under no obligation to enquire into the existence of debts or the probable application of the purchase money by his vendor. *Greender Chunder v. Mackintosh*, 4 Cal. 897.

II. The moral duty: This has been thus laid down.

रिक्थग्राह ऋणं दाप्यो योषिद्ग्राहस्तथैव च । पुत्रोऽनन्याश्रितद्रव्यः पुत्रहीनस्य रिक्थिनः ॥

याज्ञवल्क्यः । २. ५१.

He who has received the estate or the wife, (of the deceased), should be made to pay his debts, or failing either, the son who has not recieved an inheritance ( अनन्याश्रित-द्रव्यः )

In the case of a sonless (person), those who take the heritage, should be made to pay (Yajnavalkya) and this duty has been laid even upon those who possess the wife of the deceased, along with his estate* thus *e.g.* a husband, by remarriage, of a woman is under this obligation, to pay the debts to her former husband.

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*धनस्त्रीहारिपुत्राणामृणभाग्यो धनं हरेत्। पुत्रोऽसतोः स्त्रीधनिनोः स्त्रीहारी धनिपुत्रयोः॥ २३.

अन्तिमा स्वैरिणीनां या उत्तमा च पुनर्भुवाम् । ऋणं तयोः पतिकृतं दद्याद्यस्ते समश्नुते ॥ २४. नारदः ऋणादाने ॥ For an excellent exposition of this see अपरार्क Pages 651 & 599.

This duty rests upon the broad equity that he who takes the benefit, should take the burden also. The obligation attaches whether the property devolved upon an heir by operation of law, or whether it was taken by him voluntarily.

Cf. S. 128 of Act IV of 1882 (Transfer of property) according to which, where a gift consists of donee's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein."

The *liability* is *personal*. *Debts* are *not* a *charge* upon the estate. The creditor may hold the heir personally liable for the debt, if he have alienated the property, but he cannot follow the property. *Luxman v. Sarasrutibai*, 12 Bom. H.C.R. 98: *Jamiyatram v. Parbhudas*, 9 Bom. H. C. R. 116.

**Coparceners taking by survivorship.** Although according to the *Mitakshara* Law, an undivided coparcener cannot dispose of his share of the joint property, unless in a case of necessity and without the consent of his coparcener, yet, it has been held by the Privy Council in *Deen Dyal v. Jugdeep Narain*, 4 M.I.A. 247, that a creditor who has obtained a judgment against him for his separate debt may enforce it during his life by seizure and sale of his undivided interest in the joint property.

But whether the creditor loses his right against the undivided share of the debtor, if the latter dies before judgment against him, and seizure in satisfaction, is a question which has received several times the attention of the Court in India *e.g.*, the Courts of Bombay, Madras, and N.W.P., and has now been definitively settled by the Privy Council. The most important case in Bombay on the point is that of *Udaram v. Ranu*, 11 Bom. H.C.R. 76., Where, a Hindu undivided in estate from his father, died separately indebted to the plaintiff, who obtained a decree against the father and wife of the deceased, as his legal representatives, to recover, from the estate and effects of the deceased, the amount of their debt and costs, and sought in satisfaction of the decree, to attach a shop, which during the life-time of the deceased and subsequently to his death, had been in the possession of the father, there being no proof of any separate estate of the deceased having devolved upon his father; *Held* that, though the son was during, his life, jointly in estate with his father in the shop as being

ancestral property, his right had come into existence at his birth and died with him, and therefore the plaintiffs could not render the shop available for their claim.

The result of all the cases is that, if the deceased debtor is an ordinary coparcener, who has left neither separate nor self-acquired property, the creditor who has not attached his share before his death, is absolutely without a remedy. If he stood in the relation of father to the survivours, his liability can only be enforced by a separate suit against the sons. *Shivagiri v. Alwar Ayyangar*, 3 Mad. 42. If however, the estate of a coparcener has vested in the official assignee under an insolvency, that estate would continue after his death, and would not be defeated by survivorship. *Fakeerchand v. Moti Chand*, 7 Bom. 438: *Suraj Bansi Keer v. Sheo Prasad*, 6 I. A. 88.

Even the general law in India as laid down above has been considerably modified by the Privy Council case of *Deen Dayal v. Jugdeep*, 3 Cal. 198, according to which the purchaser acquires the judgment debtor's share as if a partition took place at the time of the execution sale.

And very recently, a husband's debts were held binding upon a widow who had received assets from him.

The deceased husband of defendant executed a promissory note as a surety, and after his death a decree was obtained against the defendant, his widow, on the promissory note. The decree-holder attached a house which had belonged to the deceased, and in which the widow was residing, brought it to sale and purchased it. On his endeavouring to obtain possession the widow resisted on the ground that she had a right of residence in the house during her lifetime and could not, therefore, be ejected:—*Held*, that the decree-holder was entitled to be given possession of the house and that the widow had no right of residence therein.

*Jayanti Subbiah v. Alamelu Mangamma*, 27 Mad. 45.

III. The third and the last is the *legal duty* of paying a debt contracted by one person as the *agent* or *privy in blood or interest*, of another. Mere relationship, however close, creates no obligation. On the other hand, all the members of the family, and therefore all their property, divided or undivided, will be liable for debts which have been contracted on behalf of the family by one who was authorized to contract them. The most common case is that of a manager. He is, by his very office, the accredited agent of the

family and authorized to bind them for all proper and necessary purposes within the Scope of his agency. The binding character of any decree obtained against the manager depends upon the authority of the manager to contract the liability, and not upon the coparceners having or not having been made parties to the suit. *Hari v. Jayaram*, 14 Bom. 59: *Sakharam v. Devji*, 23 Bom.372. *Vishnu v. Venkatrao*, P.J. for' 96, P. 249, and the case, of a debt contracted by manager for family necessity stands upon an equal footing. *Aghornath v. Green Chunder*, 20 Cal. 18. *Narayan v. Political Agent Sawantwadi*, 7 Bom. L.R. 172.

It has been held that, debts contracted by persons carrying on a joint family business, must override the rights of all members of the joint family in the property acquired with funds derived from the family joint business. *Sheo Pershad v. Satop Lal*, 20 Cal.453; and when such debts are contracted by the agent of the manager, his power thereto is limited to the extent of that of the manager. *Sham Sundar v. Achhen Kunwar*, 25 I.A. 183; 21 A. 71.

Similarly, the official Assignee of a manager of a family cannot dispose of the family estate, except for debts which are binding on the family. *Rangayya chetti v. Thanikachalla*, 19 Mad. 74.

On his death, the interest of a member in the Joint family property, passes by survivorship to the surviving members of the joint family, and cannot be made available in satisfaction of his private debts. His legal representatives must be sued if a decree is sought against his self-acquired property. *Narhar Moreshwar v. Waman Rao*, P.J. '96, p. 531.

In the case of a joint family consisting only of brothers or collaterals, the presumption is that the debt is for the benefit of the family. But when the interests of a minor coparcener are affected, the creditor, seeking to enforce the liability, must prove that it was *bona fide* incurred by the manager for family necessity. *Jagmohan Das v. Allu Maria*, 19 Bom. 338.

**Examination Short Summary**, A man is under three—viz. Religious, Moral and Legal—duties bound to pay the debts of another, either when he bears a particular relationship to that other, or when his estate has profiled by the devolution of that other's property. The duty of a son to pay his father's debts, comes under the first of these. Now however he is bound only to the extent of the assets received by him. He is not bound to pay a debt which is immoral or otherwise unenforceable in law, nor is he bound to pay a debt of his father, incurred by him to save himself from a criminal

prosecution. This liability continues at all times and may be enforced during the father's life-time. As regards a son's position in suits by a creditor against the father alone, note the *following rules* deduced from Privy Council decisions; (1) the father may sell or mortgage the entirety, and the transaction can be enforced without sons being joined (2) But the fact that he *could* do so, raises no presumption that he *did* do so; that must be proved (3) a creditor may sell the entirety for the father's debt, though it be not for a family necessity, provided it is not immoral or illegal; and sons need not be parties to suit or execution. (4) This intention of the creditor to sell the whole must appear from the (*a*) form of the suit (*b*) execution proceedings, or (*c*) the proclamation of sale and certificate, and non-joinder of sons in execution may be material. (5) The words "right, title and interest of the judgment debtor" may mean the personal or the family interest. (6) The question in each case is, what did the court intend to sell and the purchaser expect to buy and no more can pass than the court could and actually did offer for sale. The court will also look to the adequacy of the consideration in determining the extent of the interest passed. But a father's debts are not a charge upon the property, and a creditor cannot follow it into the hands of the son's purchaser. The other two kinds of duties viz. Moral and Legal are instanced in those who receive the assets of the deceased.

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QUESTIONS:—1. What is the extent of a Hindu son's liability for his father's debts? Is a grandson liable for his grand-father's debts? In what cases can a son plead exemption from liabilities contracted by the father.

2. How far is a son affected by (1) Suits (2) Execution proceedings, exclusively conducted against the father. Examine the principles, which apply in such a case, with special reference to decided cases.

3. How far are debts a charge upon the estate, received (1) by the son from his father, (2) by a coparcener by survivorship, (3) by a separated kindred by succession and (4) by a stranger.

## CHAPTER VIII.

# Alienations.

**General.**—Closely allied to the general principles laid down in the Chapter or joint family and the particular rights and liabilities of a debtor and his coparceners or representatives in the last chapter, is the topic of *Alienations generally* by a Hindu. This subject may be looked at from various points, and with equal variations of incidents viz. by seeing whether

1. The family is governed by *Mitakshara or Dâya Bhâgâ.*

2. The property is (a) joint or several (b) moveale or immoveable.

3. The alienor is the father, manager, or simply an ordinary member.

4. The act purports to dispose of more than, equal to, or less than the alienor's share.

And lastly, qualifying generally all these conditions, whether

5 The alienation is (*a*) for consideration (*b*) or voluntary.

(*a*) If for consideration, what was its nature and how was it applied?

(*b*) If voluntary, whether to an individual or individuals (I) for private use (gifts) ; (II) or for the use of a particular society or the public at large (religious and charitable endowments)

**Father under the *Mitakshara* Law:**— Under *Mitakshara*, there is no distinction between a father and his sons, as member of a family. They are simply coparceners. So long as he is capable, the father is the head and manager of the family. He (1) is entitled to the possession of the joint property, (2) directs the concerns of the family within itself, and (3) represents it to the world. But as regards substantial proprietorship, he has no greater interest in the joint property than any of his sons. If the property is ancestral, each by birth acquires an interest equal to his own. If it is acquired by joint labour or joint funds, then all stand on the same footing.

**His power over ancestral moveables.** *Vignaneshwarâ* does not claim for the father an absolute power of disposing of moveables at his own pleasure, but only an independent power in the disposal of them for indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress &c.

In *Laksman v. Ramachandra*, 1 Bom. 561, (*Suraj Bansi v. Sheo Prashad*, 6 I.A. 100) accepted, *Chuturbhuj v. Dharmsi*, 9 Bom. 438, where a Hindu governed by the *Mitakshara* law died, possessed of a large amount of ancestral moveable property and with two undivided sons, and by his will he bequeathed, to one of his sons, the whole of the property, it was held that the will was against the principles of Hindu Law. (*cf. Harilal v. Bai Mani* 7 Bom. L. R. 225) it was remarked, that the father has a special power of dealing with ancestral moveable property, but only for certain very special purposes specified by the *Mitakshara*.

( तथापि पितुरावश्यकेषु धर्मकृत्येषु.........स्थावरव्यतिरिक्तद्रव्यविनियोगे स्वातन्त्र्यमिति स्थितम्. )

It is, therefore, an established rule that a father can make no dispositions of the joint property, which will prejudice his issue, unless (1) he obtained their assent, if they are able to give it, or unless (2) there is any necessity, or moral or religious obligation, to justify the transaction for the existence of such necessity: and for the existence of such necessity the law allows no presumption. He must prove it. *Chinnayya v. Peruman*, 13 Mad. 57: and it makes no difference whether the disposition is in favour of a stranger or of one of the family. The test is, whether it is an infringement of their vested rights, *Ganga Bisweshwar v. Pirthee*, 2 All. 635, *Bala v. Balaji*, 22 Bom. 825.

And very recently, a gift of a portion of the family property, by the father during his life time by way of maintenance, to his concubine for past cohabitation was held to be not binding upon the sons, though the son is bound to maintain her. *Ningareddi v. Laksmawa*, 26 Bom. 163.

Where **property** is vested in the holder **for life only**, as in the cases of a *Vatandar*, his alienations will have no effect beyond his lifetime: the successor takes not as heir, but as successor, and therefore, the property in his hands is not liable as assets of the deceased predecessor for the payment of his debts. *Jugjivandas v. Imdad*, 6 Bom. 211: *Appaji v. Keshar*, 15 Bom. 78.

**Rights of the holder of an Impartible estate under the** *Mitakshara:* According to the decision of the Privy Council in, *Sarkaj Kuari v. Deoraj Kuari*, 10 All. 272; 15 I. A. 51, the person in possession of an impartible Raj, has, during his life, absolute control over it unless restrained by custom, or the nature of the tenure.

And even where a raj is inalienable by custom, an alienation of it would be valid if made for legal necessity; and his success or who takes the raj by right of survivorship, is, under the Mitakshara Law, liable for the debts, proved to have been contracted for legal necessity. *Gopal Prasad Bhakat v. Raghunath Deb*, 32 Cal. 158.

**Who may object.** Only such persons may object to the alienations as have a joint interest with the father in the property either by birth, or by adoption. *Rambhat v. Laxman*, 5 Bom. 630. A son cannot therefore raise any objection to an alienation made by his father before he was born or adopted. Hence, if at the time of the alienation there was no one in existence whose assent was necessary, or if those who were in existence had consented, no objection could validly be raised afterwards against the alienation on the ground that there was no necessity for it. On the other hand, if the alienation was made by the father without necessity and without the consent of sons then living, it would not only be invalid against them but also against any son born before they have ratified the transaction: and no consent given by them after his birth would render it binding upon him.

**Father's power over self or separate acquisitions.**

(1) Whatever be the nature of the property or the mode in which it was acquired, a man *without issue* may dispose of it at his pleasure, as against his wife, or daughter, or his remote descendants, or his collaterals.

(2) When he has issue, and he is (a) separated from his sons, a father can dispose of at his pleasure not only his share, but all property acquired after partition: since the sons have relinquished the right they had acquired by birth as to the former and they never had such rights as to the latter. And when he is (b) joint with his sons, he can absolutely dispose of his self-acquired property moveable and immoveable, and property inherited from collateral relations, or acquired in such a mode that his issue acquired no interest in it. *Gangabai v. Wamanaji*, 2 Bom. H.C.R. 318; *Seetal v. Madho*, 1 All. 394; *Subbayya v. Surraya*, 10 Mad. 251.

**Consent:** May be either express or implied from the conduct of the parties at or after the transaction: and ratification will supply the want of an original consent. It will be implied where there is a general authority to do all necessary acts, and the alienation was for a necessity. *Mahaderappa v. Basgowda*, 7 Bom. L.R. 256. Whether the consent of all the coparceners is necessary, will depend upon the question as to the power of one of several, to dispose of his share. If he can, the consent of some will bind their shares though not the share of those that dissent: if he cannot, then, consent of all would be required.

The consent may be express or implied. Where a grandfather alienates with the consent of his son, that consent binds an after-born grandson; but when a grandson is already in existence and has taken a vested interest, his father's consent would not of itself bind him. *Fazulbhoy Vishram v. Sadanand Trimbak Kale*, 5 Bom. L. R. 678.

**Necessity: what constitutes? and the position of the lender:** This is more or less a question of facts, to be judged of by the exigencies of each particular case. The whole current of authority supports the view that the manager has an implied authority to do whatever is best for all concerned, and that, no individual can defeat his power by withholding his consent. In Hanooman Pershad's case their Lordships observe "The power of the manger (in this case the mother of an infant heir), to charge an estate not his own, is a limited and qualified power. It can only be exercised rightly (1) in case of need, or (2) for the benefit of the estate. But where, in a particular case the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. (a) The actual pressure upon the estate, (b) the danger to be averted or (c) the benefit to be conferred upon it in the particular instance, is the thing to be regarded. The lender is bound (1) to inquire into the necessities for the loan or (2) satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that when (3) He does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of its charge, and (4) they do not think that under such circumstances, he is bound to see to the application of the purchase money. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly, and

**Some instances of necessity.**

with due caution but is himself deceived." (See also the very exhaustive judgment of *Batty J.* in *Nathaji v. Sitaram*, in 4 Bom. L.R. 587, the head note of which is reproduced in the summary of this chapter.)

The same principles would apply to **sales by a manager.** A sale of part of the property in order to raise money (1) to pay off debts which bound the family or (2) to discharge the claims of Government upon land or (3) to maintain the family or (4) to perform the necessary funeral or marriage or family ceremonies would be proper, if it was prudent or necessary.

The marriage expenses of a daughter's son, or the maintenance of an illegitimate daughter, are not a valid charge upon the family property. *Parvati v. Ganpatrao*, 18 Bom. 177.

The Madras High Court has, in *Sundari Ammal v. Subramaniya Ayyar*, 26 Mad. 505, held that the marriage of a daughter is not a necessary act which a father is bound to perform and in *Govindarajulu v. Devurabhotla*, 27 Mad. 206, the same court laid down the same principle in the case of a son's marriage. These decisions have already been noticed in the chapter on marriage. (See Page 44)

The Manager may sell for paying off an old debt which is binding but has no power to revive, by acknowledgment, a debt barred by limitation (except as against himself). *Dinkar v. Appaji*, 20 Bom. 155.

The **result** of the various **rulings** has well been summarised by the Legistature in S. 38 of Act IV of 1882 (Transfer of Property.) according to which.

"where any person authorized only under *circumstances* in their nature variable, to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith."

**Burden of proof, in case of necessity,** varies with circumstances. In *Hunooman Pershad's* case, it was contended that the burden was discharged by showing an advancement to the manager, and the factum of a deed by him: and their Lordships declined to lay any general and inflexible rule upon this question. It was laid down in Bombay, that there is no presumption that a loan contracted by the manager has been contracted for family purposes. *Soiru Padmanabh v. Narayan Rao*, *18* Bom. 520: where, however, the debt is the balance on a running account, it is not necessary for the creditor to show the purpose for which each

item was borrowed. It is sufficient to show that the family was in a chronic need of money for the current outgoings of the family, and it is enough that the moneys are advanced on the representation of the manager that they were needed for such objects. *Krishna v. Vasudev*, 21 Bom. 808.

In cases of **alienation by a widow**, where she had authority from her co-widow to do any necessary act, in which this was implied, it was ruled in a suit by the adopted son of another widow, for setting aside the alienation that the burden of proof lay on him to prove that the widow (his mother) did not consent to the sale. *Mahaderappa v. Basgowda*, 7 Bom. L. R. 258.

* **In cases of Decree**:—As to the amount of proof incumbent upon a purchaser under a decree or upon one who lends money to the manager of an estate to pay off a decree or who purchases a part of the estate from the manager to supply him with funds for that purpose, the result of the decisions appears to be that the party who relies on the decree, is entitled to assume (1) that it was properly passed, and (2) that everything, done under it, was properly done. *Malkarjun v. Narhari*, 25 Bom. 337 (P.C.) But the extent to which this will benefit him, depends upon (1) the nature of the decree, (2) the person against whom it was given, and (3) upon the form of the proceedings taken in execution of the decree.

(1) Where the decree is against a **father**, it conclusively establishes that there was a debt due by him; and as against his issue, nothing more is necessary.

(2) But otherwise, where the decree is against a single **Coparcener** It would be a perfectly valid decree against him, and might, during his life-time, be enforced by execution and sale, of his interest in the property. But, as his debts would not bind his coparceners or their share in the property, unless it was contracted by their consent, or for their benefit, so a decree against him can create no higher liability. It ascertains his debt, but does no more. If it was intended to procure payment of the debt, directly or indirectly, out of the shares of the other members, the creditor must show that the debts themselves were such as to be properly binding upon those who have not personally incurred them.

(3) Finally, there is a class of cases, in which it has been held that a suit against one member of the family, must be taken as a proceeding

against the family represented by him so that the decree binds them, and may be enforced by execution against the shares of all. See the remarks of Garth C.J. in *Jiralal Sing v. Ganga Prasad*, 10 Cal.996; *Bireswar v. Lachmisssur*, 6 I.A. 232; *Narendra Nath v. Bhupendra*, 23 Cal. 374.

II. **Manager's power of alienation:**— A hindu manager, who is other than the father, can alienate at his pleasure, his own interest in the joint property like an ordinary coparcener. He cannot, however, without the consent of the other coparceners alienate the immoveable property, unless it be necessary (1) for the family, or (2) for the discharge of an indispensable religious duty, or (3) in some other way for he benefit of the joint-estate. *Babaji v. Krishnaji*, 2 Bom. 667. See also, *Miller v. Rangnath*, 12 Cal. 389.

The mere fact that a certain person is the manager, is not enough to make his acts binding upon the members of the family. It must be shewn by the party relying on those acts and seeking to bind the other members by them that the acts were necessary or beneficial to the family, *Narayan yesu v. Political Agent Sawántwadi*, 7 Bom. L.R. 172.

Although there is no presumption that moneys borrowed by the manager are borrowed for family purposes and the plaintiff creditor must prove that the loans were contracted for the family, it is not incumbent on him to show in each item in a long series of borrowings, the particular purpose for which it was borrowed. *Krishnaramayya v. Vasudev*, 21 Bom. 808.

The manager of a joint Hindu family, has authority to acknowledge the liability of the family for debts which he has properly contracted so as to give a new period of limitation against the family from the time of the acknowledgment. He is an agent duly authorized in the behalf within the meaning of S. 19 of Act XV of 1877. He can refer any dispute regarding the family to arbitrator, if it be for the benefit of the family and the reference will be binding upon others and even those who are minors. *Balaji v. Nana*, 27 Bom. 287: *Bhaskar v. Brij Lal*, 17 Bom. 512.

But he cannot revive a barred debt except as against himself. *Dinkar v. Appaji*, 20 Bom. 155. He cannot alone sue a tenant for ejectment. *Balkrishna v. Moro*, 21 Bom. 154.

Every member having an interest in the estate has a right to question any transactions entered into by the manager; whereby they would be defrauded. *Raoji v. Gangadar*, 4 Bom. 29; and his personal debts not being binding upon other coparceners, as those of the father, alienations made by him to pay them off cannot bind them.

**Alienations by a coparcener under the *Mitakshara* Law:**—In Madras and Bombay, a coparcener may, without the consent of his other coparceners, sell, mortgage or otherwise alienate for valuable

consideration, his own undivided interest in the family estate, moveable and immoveable, to which, on partition, he may be entitled, and his share may be taken in execution of a judgment against him (during his life-time at the suit of his personal creditor. *Vasudev v. Venkatesh*, 10 Bom. H.C.R. 139; *Fakirappa v. Chennappa*, Ibid, 162 (**F.B.**).

The undivided share of a deceased member cannot be sold in execution of a mere money decree not followed by attachment, in the life-time of the judgment-debtor. *Jagannath v. Sitaram*, 11 All. 302.

Although a coparcener can alienate for valuable consideration his undivided share in the joint property, without the consent of the other coparceners, yet, he can neither give by gift, nor devise by will, his undivided share in that property, since the right by survivorship must take precedence over that by device. *Gangabai v. Ramanna*, 3 B.H.C. 66; *Vrandawandas v. Yamunabai*, 12 Bom. H.C.R. 229. (In this case a gift to his concubine to the extent of his share held invalid).

The purchaser of a share of a coparcener in a Hindu family, cannot, before partition, sue for possession of any particular part of the property, or predicate that it belongs to him exclusively; still, he may maintain a suit for partition, and thus obtain a share which he has purchased. *Vasudev v. Venkatesh, (ubi Supra).*

**Effect of alienation by a co-parcener:** This has been recently summed up by Farran C. J. in *Gurulingappa v. Nandappa*, 21 Bom. 797 as follows:—

(1) A Hindu coparcener, by an alienation of his rights in part or the whole of the joint family property, does not place the purchaser of such rights in his own position—does not confer upon him the status of an undivided Hindu. Such a purchaser is in *Vasudev v. Venkatesh*, at page 147 spoken of as becoming a sort of tenant-in common with the coparceners, admissible as such to his distributive share upon a partition taking place.

(2) Such an alienation, before partition, does not deprive the alienating co-parcener of his rights in the Hindu Joint Family. If the alienation of his rights in each individual portion of the joint family property, has not that effect, the fact that it is the last item which is being alienated cannot alter the position. The purchaser of the last item of the property of the coparcener cannot be in a better or worse position, than the purchaser of the penultimate portion.

(3) As the purchaser does not, by the death of his vendor, lose his right to a partition, so his position is not improved by the death of the other coparceners before partition.

(4) He stands in no better position than his alienor and consequently like the latter, is liable to have his share diminished before partition, by the birth of the other coparceners. if he stands by, and does not insist on an immediate partition."

The date of fixing the amount of interest which the alienee possesses in the family property, is the date of suit or partition, and not of the deed. *Rangaswami v. Krishnayya* 14 Mad. 408. (F.B.) For a fuller discussion on this point, reference may be made to the judgment of Bhashyam Ayyangar in *Aiyyagari Venkataramayya v. Aiyyagari Ramayya* 25Mad. 690 (F.B.) at p. 704, Sqq.

A sharer cannot go on for an indefinite period selling what purports to be his share, in joint family property, without the time coming when he will have exhausted that share. A purchaser bringing a partition suit, is liable to be met with the allegation of exhaustion, which, if true, must be a complete answer to his claim. *Mahamed v. Radhakrisan* P. J. '96, P. 381.

*N. B.* In Bengal and in Northern India an undivided member of a *Mitakshara* family has no power of alienating his interest by sale or mortgage and the mortgage would be of no avail, unless it is followed by a decree, attaching the mortgagor's interest, during his life-time. *Madho v. Meherban*, 18 Cal. 157. In Southern and W. India such an interest enures for the benefit of the mortgagee, even after the death of the mortgagor. *Rangayana v. Ganapa*, 15 Bom. 673.

**To alienor or his coparcener.**

**Relief how granted.**—(1) In the case of a *father*, if the alienation were made for an antecedent debt, the sons could only set it aside on paying the full purchase money, this being a debt, for which their father would be liable as for failure of consideration on the sale being cancelled and for which, in consequence, they, and their share of the property, would be ultimately responsible. (2) In the case of **any other coparcener**, the rule is, that the party setting aside the sale, must make good to the purchaser, the amount he has paid, so far as he himself has profited by that amount, either by entering into the joint-assets, or from the amount having been applied in paying off charges upon the property, which would have been a lien upon it in his hands. The onus lies upon the defendant to show that the purchase-money was so applied. *Madhoo v. Kolhar*, 9 Suth. 511: *Gangabai v. Vamanji*. 2 B.H.C.R. 318.

When the sale was made to discharge the personal debt of the alienor, there would be no equity to refund the purchase money, on setting aside the sale; and it made no difference, that the defendant was an innocent purchaser for value at an auction. It would be different where the sale was merely set aside as being beyond the powers of the vendor. *Sadashiv v. Dhakubai*, 5 Bom. 450.

**To alienee.**

The share alienated by a coparcener can be taken by the alienee only by a general partition, and not by asking that share only to be given to him. *Shivmurtappa v. Virappa* 1 Bom. L. R. 620.

**Necessity for delivery of Possession** in such transfers *(i.e.* for consideration):—Such a transfer even without possession, would of course be valid and enforceable as against the transferor. But the importance of the question would arise, where the rights of other parties are concerned. The *Madras* High Court has always held that a sale by an owner without delivery of possession is valid against a subsequent sale followed by possession, and the first vendee may successfully bring an ejectment suit against the vendor and the second vendee. *Ponnayyagounden v. Mootoogounden*, 17 Mad. 140. In **Calcutta**, it has now been held by a Full Bench that possession is essential to complete the title of a purchaser for value. *Narain Chunder v. Dataram*, 8 Cal. 597. In **Bombay**, it is essential as against subsequent transferees for value without notice. The whole law was elaborately reviewed and it was laid down that according to the decisions in Bombay, it is a general, though not an invariable, rule that possession is deemed essential to the complete transfer of immoveable property, either by gift, sale or mortgage."

**Sales.**

Exceptions:— (1) In disputes between transferors or volunteers under him and the transferees.

(2) Where the second transferee had notice of the first transfer. Notice may be actual, implied or constructive, and in Bombay Registration is implied notice, except when there is a fraudulent concealment. *Dhondo v. Raoji*, 20 Bom. 290; (but note: notice of a registered deed is not notice of a former unregistered deed which is the real document of title? *Chunilal v. Ramchandra*, 20 Bom. 213); But in Calcutta and Madras registration is not notice.

(3) In the case of judicial sales of the interest of a judgment-debtor having a valid title, possession is not necessary.

(4) So also a court purchaser's title would prevail over subsequent attaching creditor under a money decree, or their purchasers.

(5) Such a purchaser's vendee may have a good title, even though the original purchaser had not got possession. *Lakshmandas v.*

*Daust.* 6 Bombay 168. (F.B.) *Shivram v. Genu.* 6 Bom. 515 *Dundayya v. Chenbasappa*, 9 Bom. 427.

**Alienations in cases of Life-estates:—**

(1) In cases when the estate is allotted to the alienor for his maintenance, dispositions of such a property which extend beyond the life in being are *ultra vires* and therefore invalid. (*a*) In cases of grants to junior members of an impartible estate, such grants are strictly for their life and they revert to the estate on their death. (*b*) The case, sometimes, is different where the grant is for the maintenance of widows. In this case, the general rule as stated above, applies, except, when the grant is in the nature of an accumulation payment to the widow in complete severance of her right against the estate. In such a case, the alienated portion becomes her absolute property. It is, however, to be noted in this connection, that such grants are very strictly construed, and the least evidence showing that such severance was made to her, in her capacity as her husband's heir, will deprive the estate of its absolute nature. *Ganpatrao v. Ramchunder.* 11 All. 296; *Parvathy Ammal v. Sundara Moodelly*, 20 Mad. 293.

(2) As to the case of Vatans, it has been held that alienations by a watandar are valid only for his lifetime. See Sec. 5 of the Vatan Act. (Bombay Act III of 1874)

So far, alienations for consideration or not voluntary have been considered: the next subject for consideration is Voluntary alienations. These are (1) *gifts* and (2) *Religious Endowments.*

**I. Gifts: What may be given?** Property absolutely at the disposal of its owner, such as the separate or self-acquired property, may be the subject of a gift, as freely as it can be that of a mortgage or sale, subject, of course, to a certain extent, to the claims of those who are entitled to be maintained by him.

Where in a joint Hindu family, a father makes a gift of a portion of the family property, during his life-time, by way of maintenance to his concubine, in consideration of past cohabitation, the gift is not binding on his son (although the son is bound to maintain the concubine). *Ningareddi v. Lakshmawa*, 26 Bom. 163, following, *Vrandavandas v. Yamunabai*, 12 Bom. H.C.R. 229, (on similar facts).

He cannot alienate such property, or other property purchased with the help of ancestral funds, to a stranger *Ramanna v. Venkata*, 11 Mad.246; nor even to a relative, *Ponnusami v. Thatha*, 9 Mad. 273; and a gift by an undivided member to his daughter-in-law, not for value, but in consideration of natural affection was held to be invalid. *Virayya v. Hammanta*, 11 Mad. 459.

The self-acquired immoveable property given by a person to his sons in his life-time was held subject to a charge of maintenance for his wife, who was not provided for. *Narmadabai v. Mahadev*, 5 Bom. 99; such property, under the Benares Law, is not so absolutely at the disposal of the acquirer as to enable him to give it all to one son or grandson to the exclusion of the rest. *Mahasookh v. Budree*, 1 N.W. 153; but this prohibition in the text, is based on moral or spiritual grounds, and such an exclusive gift will not be invalid, as it is not *illegal*. *Sital v. Madho*, 1 All. 394.

These principles apply generally to gifts: but the validity, or otherwise, of a gift will be determined by special circumstances in particular cases: In the following cases, the **gifts** were **held** to be **valid:**—

[**1**] A genuine gift by a father-in-law to his widowed daughter-in-law by way of affection out of a small share of moveable property, most of which was acquired by him while in union with his sons and grand-sons. *Hanmantappa v. Jivabai*, 24 Bom. 547.

[**2**] A gift by a mother, succeeding to a son in whom the whole family property had vested, and who had died without issue, to her son-in-law at the marriage of her daughter. *Ramasami Aiyyar v. Vengiduasami Aiyyar*, 22 Mad. 113.

[**3**] A gift of Rs. 20,000, by a sole surviving member in a joint Hindu family, owning property worth about Rs. 10 to 15 lacs, to his only daughter and child out of the income. *Bachoo v. Mankorbai*, 6 Bom. L.R. 268.

[**4**] A *donatio mortis causa* (gift made in contemplation of death) is valid. *Upendakrishna v. Nobinkrishna*, 3 B.L.R. O.C. 113; 12 W.R. 4. *Visalatchmi v. Subbu Pillai*, 6 Mad. 270.

[**5**] A contingent gift is valid.

[**6**] Where the donee is an idol, or a temple, or a religious community, and the effect of the gift is to tie up the property in the hands of the donee and his successors. *Fatmabibi v. Advocate General of Bombay*, 6 Bom. 42; *Limji v. Bapuji*, 11 Bom. 441.

**Invalid gifts:** A gift is invalid if it (1) creates an estate unknown to, or forbidden by, Hindu Law; (2) or contains provisions repugnant to the nature of the grant—such as, restraint upon alienation or partition &c. (See *Wills*).

**Conditions essential to valid gift:** (1) There must be a giving, either orally, or in writing, with the (2) intention to pass the property in the thing given, and (3) an acceptance in the donor's life-time

whether the gift be *in presenti* or *in futuro.* (4) The donee must be in existence and capable of accepting the gift at the time it takes effect *i.e.* the actual time of giving viz. (*a*) the *date of the gift*, if it be *inter viss*, or (*b*) of the death of the testator if by will, and not the possible time of receiving. *The Tagore case: Bai Mamubai v. Dosa Morarji*, 15 Bom. 443.

Although an *idiot* child cannot take by inheritance, there is no prohibition in Hindu Law against a gift to him. *Kooldebnarain Shahee v. Wooma Coonara*, Marsh 357; 2 Hay 370. (A Leper may make a gift. *Sama Charun v. Rup Dass*, 6 W.R. 68.)

When the **gift is** to a **class:—What is a class?** "a number of persons are popularly said to form a class, when they can be designated by some general term, as children, grand children, nephews; but in legal language, the question whether a gift is one to a class depends, not upon those considerations, but upon the mode of the gift itself viz: that it is a gift of an aggregate sum, to a body of persons ascertained at a future time, and who are to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons" Jarman on Wills I. 232, cited Mayne P. 380. *Leake v. Robinson*, 2 Mer, 363; *The Tagore case*, 9 Beng. L.R. 377; *In re Coleman* 4 Ch. D. 169.

The **rule does not apply,** (1) Where the individuals are named, (2) or where the nature of the benefit conferred is not dependent upon the number of persons who may ultimately prove that they have a right to share. *Krishnanath v. Atmárám*, 15 Bom. 543.

*N.B.*—This doctrine is not of universal and invariable application in India. And " where a gift is to a class, some of whom are, or may be incapable of taking, because not born at the date of the gift, or of the death of the testator, as the case may be, and where there is no other objection to the gift, it shall enure to the benefit of those members of the class, who are capable of taking " per Wilsom J. in *Ramlal Sett v. Kania Lal* 12 Cal. 663; *Bhoba Tarini v. Peary Lall* 24 Cal. 646, unless the court is satisfied that the testator intended that the class, and not any individual member there of should take· *Goverdhandas v. Ram Kuar Bai*, 3 Bom. L. R. 857 and 874. See also Ss. 98 to 102 of Act X of 1865. The Calcutta case was followed in Bombay and Madras, where property was granted to a man for his life, and after his death, to persons forming a class (in Madras, brothers, in Bombay, his children) whose description would equally embrace persons born during and after the life-time of the testator. In each case, the person who claimed the property had been in fact born before the document took effect, and no one had been born after that date. The Court

held that he was entitled to take. The Court observed, citing, Jessel M. R. in *In re, Coleman* 4 Ch. D. 169: "the testator may be considered to have a primary and a secondary intention. His *primary* intention is, that all members of the class shall take, and his *Secondary* intention is, that if all cannot take, those who can, shall do so" *Mangaldas v. Tribhoovandas* 15 Bom. 562; *Tribhoovandas v. Gungadas* 18 Bom. 7; *Krishnarao v. Benabai* 20 Bom. 571; *Khimji Jairam v. Morarji* 22 Bom. 533; *Munjamma v. Padmanabhayya* 12 Mad. 393. (As to Powers, see **wills.**)

**Essentials of a gift:** (1) All the earlier decisions following the direct principles of Hindu Law pure and simple, laid down that a gift of land is not complete, unless accompanied by delivery of possession or any other act indicative of it *e.g.* receipt of rent etc. *Harjwan v. Naran Haribai*, 4 Bom. H. C. (A.C.) 31. *Bank of Hindustan &c. v. Presschand Raichand*, 5 Bom. H.C. 83 (O.C.J.) *Dagai Dabee v. Mothura Nath*, 9 Cal. 854; *Venkatachella v. Thakammal*, 1 Mad. 460; In *Kalidas v. Kanhya Lal*, 11 I.A. 218, the judicial committee held that "a gift is not invalid for the mere reason that the donor has not delivered possession; and that where a donee or vendee is under the term of the gift or sale, entitled to possession, there is no reason why such a gift or sale, should not give the donee or vendee, a right to possess." See also *Manbhari v. Naumidh*, 4 All. 40; and *Balmakand v. Bhagwandas*, 16 All. 185. In *Abaji Gangadher v. Mukta*, 18 Bom. 688 the Bombay High Court held that possession was necessary.

**Possession.**

But where one of several joint-donees, is already in physical occupation, a declaration by the donor, assented to by the donee, that he has parted with possession in favour of the donee, converts mere occupation into possession, and amounts to a valid gift under the Hindu Law. *Bai Kushal v. Luckshmamana* 7 Bombay 452.

The **Current** of decisions was, however, **changed by the Cal. High Court in** *Dharmodas v. Nistarinidasi*, 14 Cal. 446, where applying the Transfer of Property Act to a question of a gift by a Hindu it was held that the provisions of Hindu Law, which require possession for a complete and valid gift, have been abrogated by S. 123 of that Act. And this decision was **followed in Bombay** in *Bai Ramabai v. Bai Mani*, 23 Bom. 234: See also *Ramchandra Mukerji v. Ranjit Singh*, 27 Cal. 242.

N. B. Where, in gifts before the application of the Transfer of Property Act, possession was necessary, but not given, but a deed of gift was registered, it was held that mere registration was not sufficient to make the gift complete according to Hindu Law. *Lakshimoni Dasi v.*

**Registration not = possession**

*Nittyananda Day*. 20 Cal. 464 (Secondly) no words of inheritance are necessary,to pass a freehold interest in land to the heirs. *Anundamoney Dossey v. Doe. D. East India Company*. 8 M. I. A. 43, the intention of the donor may be expressed in other ways, and is a matter of construction merely. *Ram Narain Singh v. Peary Bhugut*, 9 Cal. 830.

**Gift jointly — no survivorship**

Where property is given jointly to two persons, members of a Hindu family, each donee takes a separate interest in the property, and on his death it passes to his heirs and not to the other donee by survivorship. *Bai Divali v. Patel Becherdas*, 26 Bom. 445.

**Revocation of gifts:**— a gift made under a mistake of law, cannot be revoked. Thus where a Hindu made a gift to a person whom he said he had taken as his *Mânasputra*—held that he could not set it aside. *Abhachari v. Ramachandrayya*. 1 Mad. 393; but where a gift is made in expectation that the donee will do some work in consideration of the gift, if the donee fail to do that, the gift is revocable. *Mahader Pandit v. Badamo* 5. N. W. 5. where however, the donor has taken all the steps in his power to give effect to a gift, it is complete, and he cannot revoke it by a subsequent will. *Rajarâm v. Ganesh*, 23 Bom. 131. N. B. Such a gift is valid even against the creditors, provided it was made *bona fide* and not as a fraudulent contrivance. *Ganga Baksh v. Jagat Bahadur* 23 Cal. 15 (P.C.) 22 I. A. 153.

(2) **Religious and charitable endowments:**— Gifts for charitable and religious purposes are ordained by the Hindu texts and they are specially favoured, in that a gift of this nature, if left incomplete by the donor, a special duty is enjoined upon his sons and heirs, to complete it after his death. So that, these form an exception to the general rule which requires delivery of possession for a gift to be valid and complete. Such grants have been held up, even when made by a widow, of land which descended to her from her husband. *Jugjeevan v. Deoshanker*, 1 Bom. 394.

**Kinds of.**

Such dedications may be to public as well as to private idols, with trustees, of whom the settlor may be one or the property with the endowment may vest in him as the sole trustee. "Where property is dedicated to an idol without any reservation in favour of any person, it becomes the absolute property of the god and is called a **Perfect** Endowment. It is **Imperfect**, where the dedication is

not absolute and unqualified, but reserves some interest or benefit to any person not consistent with the debutter character of the property, it is alienable, heritable and partible, subject to the charge of worshiping the idol. *Ram Coomar v. Jogender* 4 Cal. 56; *Suppammal v. Collector of Tanjore* 12 Mad. 387; *Sonatun Bysack v. Juggutssundaree* 8 M.I.A. 66. But where the dedication is not a real one, but is only a device for settling the property in perpetuity on the descendants of the donor in certain specified lines, the dedication is **Fictitious** and the gift is wholly inoperative" *Promotha Dossee v. Radhika Persad* 14 B.L.R. 175; *Maharajah Mahtab Chand v. Mir Dad Ali* 5 Sel. Rep, 258.

*N.B.*—Property, given to a living person, cannot be made inalienable even though given for a religious object. *Anantha v. Nagamuthu* 4 Mad. 200.

**How created.**

Formerly no document was necessary: but now such gifts must be by "a registered instrument signed and attested by at least two witness" S. 123 Act IV of 1882. (2) No trust is necessary for this purpose. The necessity of a trust is a modern peculiarity of English law. A Hindu may express his purpose and order an institution, according to his law. Per West J. in *Manohar Ganesh v. Luxmiram* 12 Bom. 247.

**Tests of a valid Dedication.**

Mere purchase in the name of an idol, or mere appropriation of property to the *seva* of an idol by a sort of a family arrangement, cannot establish dedication. *Maharanee Braja Soonduri v. Rani Lutchmee Kumaree* 2 P.C.R. 869: *Ram Coomar v. Jogendra* 4 Cal. 56. The test of an Endowment being *bona fide* or nominal is to see how the founder himself treated the property, and how his descendants have treated it since. *Suppammal v. Collector of Tanjore* 12 Mad. 387.

**How annulled.**

The dedication made in favour of a Religious institution of a *public* nature, cannot be annulled at all. *Nam Narain Singh v. Ramom Pandey* 23 W.R. 76. An endowment in favour of a *family* idol may be cancelled by a concensus of the whole family.

**Powers and functions of the manager:**— The *manager* or *Shebait* is generally not the person who actually performs the worship of an idol. So a *Sudra* or a *female* may be eligible for the post. *Keshar Bhat v. Bhagirthibai* 3 Bom. 75. His position is that of a trustee and property given to an idol, cannot be dealt with by him as his own.

See the judgment of West J. in *Manohar v. Laxman* 12 Bom. 263. He is competent to borrow money for proper expenses of keeping up the worship, repairing temples, defending litigation, and other like objects. *Prosunno Kumari v. Golab Chand*, 3 P.C.R. 102.

When the property, the subject matter of the endowment, cannot be kept up, the trustee is justified in alienating the property, with a view to apply the proceeds to other pious and charitable purposes *Maniklal v. Mancharshi* 1 Bom 269. The same court, however, in *Narayan v. Chintaman* 5 Bom. 396 and *The collector of Thana v. Hari Sitaram* 6 Bom. 546 expressed the view that in this country, religious endowments, whether Hindu or Mahomedan, are not alienable and even the revenues may be occasionally allowed for some purposes necessary for the endowment. See however 3. P. C. R. 102. The property of the endowment is not the private personal property of the manager, and cannot be sold in execution of a personal decree against him. *Juggernath Roy v. Kishen Pershod*, 7 W.R. 266. Offerings made to an idol, cannot be treated by the trustees as their private property; and they are responsible for the due appropriation of such property to the purposes of the foundation. *Manohar Ganesh v. Lukshmiram*, 12 Bom. 247.

Places of worship, and property which is absolutely dedicated to an idol, in other words, a *perfect* endowment, are not divisible. *Anundamoyee v. Boykant Noth*, 8. W. R. 193. But where the endowment is an *imperfect one*, it is both alienable and partible, subject to the trust. *Sonatun Bysack v. Jagutsundari*, 2 P. C. R. 37. Where property is validly dedicated to a family idol, the members are entitled to take the emoluments, in rotation (W. & B. pages 730 and 890). A religious office can never be sold to a stranger, *Kuppa v. Dorasami* 6 mad. 76; except when the stranger is competent to perform the duties of the office, in which case it is valid only for the lifetime of the transferor *Ukoor Doss v. Chandra Sekhore* 3. W. R. 152; It may be made toa person who is in the line of heirs and qualified to perform the duties of the office. *Sitaram v. Sitaram*, 6 Bom. 250; *Mancharam v. Pransahankar*, 6 Bom. 298.

Succession to the office takes place according to the directions of the founder *Kamini Desi v. Ashutosh Mukarji*, 16 Cal. 103, and in the absence of any express direction or rules, the usage of the institution

governs the devolution of the office. *Janaki Debi v. Gopal Acharya*, 9 Cal. 766; andin the absence of this also the heirs of the donor are entitled to succeed. *Gosami Sri Girdhariji v. Raman Lalji* 17 Cal. 3.

Mere succesion of a son to a father, for two generations, in the trusteeship, cannot create a hereditary right. *Appasami v. Nagappa* 7 Mad. 499; though, such succession may be some, if not conclusive evidence of an hereditary right. *Veeraswami v. Subba Row* 6 Ind. Jur. 629.

In a joint Hindu family under the *Mitakshara*, succession takes place by survivorship, in the absence of any special rule or custom providing a different mode of devolution. *Ukoor Dass v. Chandra Sekhore*, 3 W. R. 152.

**Law relating to Math:**— "a math is a place of abode for students and others" (" मठश्छात्रादिनिलयः " इत्यमरः । २.२.८.) The typical *math* consists of an endowed temple or shrine with a dwelling-place for a superior, or the (Mohunt), and his disciples (Chelas). The endowment of a Math is either the result of private dedication, or is a grant made by, and the institution itself is an off shoot from, an already existing wealthy Math. per Phear J. in *Gossain Dowlat v. Bissessur*, 19 W.R. 115.

**What is a math?**

The *Math* is under the management of a *Superior* of the order, who is called the **Mohunt** (महंत). He is in charge of the endowment, with only a life-interest in the property, so that, he cannot create an interest superior to his own, or except under the most extraordinary pressure and for the distinct benefit of the endowment, bind his successor in office.

**Its management. The mohunt.**

A purchaser from a *Mohunt* may be sued after his death by his successor and the cause of action wound date from his election: and no length of possession duriug the vendor's lifetime would give the purchaser a valid title as against the new successor. *Mohunt Burm Suroop v. Kashi Jha* 20 W.R. 471.

But in *Dattagiri v. Dattatraya* 27 Bom. 363, the High Court of Bombay has held that such a suit would become time-barred if brought more than twelve years after the alienation. There the suit was by a successor for setting aside an alienation by his predecessor and *guru*, contending that the *guru's* alienation not being valid beyond his life-time, it was not binding upon him. Though the finding of the lower Court was that the property was the private alienable property of the holders, the Court assumed that it was held by the predecessor *as head of the Math and as trustee* thereof and the Court, Jenkins C. J. on the analogy of the decision in *President, &c. of the College of St. Mary Magdalen, Oxford v. The Attorney-General* 6 H. L. C. 189 held that the suit was

barred, as being more than twelve years after the date of alienation by the *Mohunt* in office (the case in 20 W.R. 471, was neither referred to in argument, nor in the judgment. A Mehunt is not a trustee for any one, and the successor of such a one, cannot sue for the recovery of property sold by his predecessor. *Manick v. Mancharshi* 1 Bom. 277. In a later case, the defendant took the house in dispute on lease from one Raghunathdas who was the manager of a certain math. After the death of Raghunathdas his disciple, the present plaintiff, brought a possessory suit in the Mámlatdár's Court against the defendant, and the Mámlatdár on the 6th May, 1889, dismissed the suit on the ground that by not producing a succession certificate the plaintiff had failed to establish his title as heir to Raghunathdas. Subsequently the plaintiff, describing himself as the manager of the math, brought the present suit on the 7th February, 1900, to recover possession of the house and rent or damages for use and occupation. It was contended that the suit was time-barred under article 47, schedule II, of the Limitation Act (XV of 1877), it being not brought within three years from the date of the Mámlatdár's order.

*Held*, that the suit was not time-barrrd under article 47, schedule II, of the Limitation Act (XV of 1877), because the first suit in the Mámlatdár's Court was brought by the plaintiff in his personal and private capacity, while the second suit was brought by him as manager and on behalf of the math. *Babaji Rao v. Luxmidas* 28 Bom. 215.

In connection with the property of a math there are **two distinct classes of suits** those in which the manager seeks to enforce his **private and personal** rights and those in which he seeks to vindicate the **rights of the math.**

A math like an idol is, in Hindu Law, a judicial persona capable of acquiring, holding and vindicating legal rights through the medium of some human agency. When the property is vested in the math, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager, not because the legal property is vested in the manager, but because it is the established practice that the suit should be brought in that form. But a person in whose name the suit is thus brought has in relation to that suit a distinct capacity : he is therein a stranger to himself in his personal and private capacity in a Court of law. *Babaji Rao v. Luxmidas* 28 Bom. 215.

**Examination: short Summary.** The nature and effect of an alienation is determined by the character of the property alienated and the capacity of the alienor. Under Mitakshara, a father is a simple coparcener with his sons with respect to property which is ancestral. He can make no disposition of the joint property to the prejudice of his issue, unless, (1) it is made with their assent or (2) there is any necessity or moral or religious obligation to justify it. Alienations of property in the nature of a life-estate are valid only to the alienor's life.

Impartible estates are under the absolute control of the holder, except where special custom exists to the contrary.

The position of a father *qua father* as also, as a manager and the effect of his act &c. was recently examined by Batty J. in *Nathaji v. Sitaram*, 4 Bom. L.R. 587; who summed up his conclusions as follows:—

To render a sale made by a Hindu father, of ancestral property binding on sons, **two essentials** are **necessary:** (1) a morally unimpeachable debt antecedent to the transaction which purports to affect the son's interests; (2) the completion of such transaction.

It **cannot be disputed** on the ground (1) that the debt was not incurred for the benefit of the family, or (2) that the alienation had been made in a particular way, either *in invitum* on a money-decree or a mortgage-decree, or by private conveyance or (3) that the son had not been a consenting party to the debt or to the transaction by which his interest was alleged to have passed.

**Alienation by a member.**

It is a primary and general rule that no member of a co-parcenary can alienate or encumber more than his own share, unless (1) justifying necessity, material or spiritual, be shown, or (*b*) unless all the coparceners to be affected give express or implied consent.

**Father & Manager.**

If, however, family necessity exist, the ordinary manager has power to do what is best, and when so acting, his power cannot be defeated by any individual member withholding his consent. A father and head of the family might have greater powers, but could not have less. There is no presumption in favour of the manager that money borrowed by him are for family purposes *Krishna v. Vasudev*, 21 Bom. 808; and the father is not in a mere favourable position. (13 Mad. 51). In both cases, the following **principles** apply **when consent is not given.**

*a*. The power must be exercised only in case of need;

*b*. The matters to be considered are i. the existence of pressure, ii. the means of averting it, iii. the benefit to be conferred;

**Lender's position.**

*c*. If the lender or purchaser be a party to mismanagement, he cannot take advantage of his own wrong; he is, however, not affected, unless he acts *mala fide*, though better management might have preserved the estate from debt:

*d*. The lender or purchaser is bound to enquire, but if he do not enquire and act honestly, the real existence of necessity is not a condition precedent to the validity of the transaction, provided, the necessity alleged is sufficient and reasonably credited.

*e*. He is not bound to see to the application of the purchase money advanced.

The effect of an alienation by a coparcener is that the purchaser cannot better his position, by any death in the family, but his share may become diminished by birth. In the case of gifts. Only self-acquired separate property can be given. Possession now is not necessary under S. 123 of the Transfer of Property Act. The rule in India as to gifts to a class is that where some members are capable of taking and others are not so, those that are capable may take. When once made, it cannot be revoked, unless it is made on a condition, which has not been satisfied. Gifts take a wider form in the shape of Religious Endowments, when the ultimate object of the gift is some benefit or advantage to the public. Such endowments are perfect imperfect or Fictitious. The last is invalid and the first two valid and good in law. Maths are places of abodes for the students and others. The manager in charge is called a Mohunt and is for life only.

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QUESTIONS. 1. How and what property may be alienated under the Hindu Law?

2. Compare the position of a father, manager and any other coparcener and that of a purchaser from each one of these. How far consent of other members can validate an assignment in each of these cases?

3. What is the effect of an alienation of a coparcener of his joint undivided share? What is the position of the purchaser?

4. What is a "class"? How far are principles of English Law applied in India when the gift is to a class, some only of whom are capable of taking? What are the statutory provisions in India about such transfers?

5. What are the essentials of a valid gift? How far possession is necessary for it? When may a gift said to be invalid? Give instances of each. Can a gift once made completely, be revoked?

6. Write a short note on charities in India and state how they are created, continued and extinguished. How many kinds are there of such charities? Define a math and estimate the position and powers of a *Mohunt!*

## CHAPTER IX.

# Partition.

**General:**—One of the rights to which a member of a joint Hindu family is entitled, is the right to demand partition. The family is, in its normal condition, joint. But it cannot for ever remain so. The number of members, *e.g.*, becomes sometimes, so large, that joint living becomes impossible. Moreover, the diversity in intellectual attainments necessarily followed by an equal diversity in pecuniary acquisitions, adds greatly to the increasing spirit of asking for a separate living. In recent times, contact with the west with its general system of a separate living, is greatly responsible for an increase of this spirit here in India.

The topics to be considered in this chapter are :

I. The meaning of "partition."

II. Who are entitled to it ?

III. What things are liable to partition and the time when it may take place.

IV. The mode of partition.

V. What constitutes partition ?

VI. Re-union and its results.

**I. Partition defined :** According to *Vijnaneshwara*, " It is the adjustment of the rights of many over the whole property, by distributing those rights on particular portions of it. Under this school, until partition, the extent of interest of the several members is kept continually fluctuating on account of births and deaths in the family (See Page 86).

**II. Who are entitled to partition?** It has been seen above (Chapter in Joint Family Pages 86, 89) that every member of a joint Hindu family has an undefined interest in the entire property, and every such member is entitled to demand its partition, quite irrespective of the wishes of his other coparceners. *Shomasoondari v. Jardine Skinner & Co.* 12 W.R. 160. *Wasantrao v. Anandrao* 6 Bom. L.R. 925.

**Sons and grandsons.**

(1) Under the *Mitakshara*, a son can demand partition of ancestral property of all sorts from his father : *Jugmohundas v. Mungaldas.* 10 Bom. 529 : (*Contra*—in Bengal).

And this right has been accorded to him by all the *Mitakshara* courts excepting Bombay. *Jogul Kishore v. Shib Sahai* 5 All : 430, (**F.B.**) *Subba Ayyar v. Ganasa Ayyar* 18 Mad. 179; *Rameshwar v. Lechmi Prosad* 31 Cal. 111 at 129. The Bombay High Court, however, in *Appaji Narher v. Râmchandra* 16 Bom. 29 (**F.B.**), held by majority, that, a son cannot in the life-time of his father, sue his father and uncle for partition.

*Telang J.* however, in a dissenting judgment has ably surveyed and examined the whole law and has come to the conclusion that the son *can* demand partition under such circumstances. And referring to this case in *Wasant rao v. Anand rao* 6 Bom. L.R. 925 at P. 945, Jenkins C.J. has observed "right or wrong, that judgment is binding on us." On an examination of the original passage, it will be seen that the conclusion arrived at inBombay will not, even with great difficulty, be maintained. That however, was a decision expressly under the *Mitakshara*, though in the judgments there are *obita* to be found which amount to lay down that even under the *Mayukha*, the result would be the same. (See *e.g.* Candy J :). Relying on these *obita*, it has been held very recently in Bombay by *Tyabji J.* that even under the *Mayukha*, a son cannot demand partition in his father's life-time, against his wish, when he is joint with the uncle, *Jivabhai v. Vadilal* 7 Bom. L. R. 232.

This decision was given on 28th January 1905, and is very likely under appeal. It is not yet time therefore to say anything regarding it. Having regard however, to the express text cited and the conclusion drawn therefrom by the author himself, it would appear strange that a specific case answering exactly the state of things as in 7 Bom. L.R. 232, and provided for and decided one way, should receive an exactly opposite decision in the courts, which have to follow and administer the law as laid down in the texts (See *Mayukha* citing *Brihaspati* at.p. 34 L. 1-3. क्रमागते गृहक्षेत्रे पिता पुत्राः समांशिनः। पैत्रिके न विभागार्हाः सुताः पितुरनिच्छया॥ अर्थात्पितामहाद्यार्जिते तदनिच्छयापि विभागार्हाः इत्यर्थः ॥

A **grandson** occupies the same position as that of a son in the several provinces as noted above.

**Son born after partition.**

According to the general rule of Hindu law, a son born after partition has no claim on the wealth of his separated brother. He can only claim from the wealth of his father and he shall have a share from it with those only of his brothers who are united with the father. The father in a Hindu family has a right, when he so desires, to make a partition.

and it binds his grown up, as well as minor, sons provided he does not transgress the latitude of discretion allowed him by law. *Ganput v. Gopal rao* 23 Bom. 636. *Kundasami v. Dorasami* 2 Mad. 317.

In this case, the partition was between a father and three sons, of whom, one, who was a major, lived separate and the two, who were minors, remained joint with the father. In a suit by a subsequently born son, the separated son's property was not allowed to be included for partition.

It would be otherwise, however where the whole property has been divided between the sons without the father reserving any share for himself. In such a case, a fresh partition of the property with the subsequent acquisitions was allowed. *Chengann Nayudu v. Munisami* 20 Mad. 75.

**Posthumous son!**

"A son born after the father's death, and after partition by the brothers, takes his proper share from his brothers, together with the income of the same, less the legitimate expenses" (See Vijn: on Vijn: II. 122) and this rule is applicable also to the posthumous sons of deceased co-parceners, born after partition by the survivors.

**An adopted son.**

An adopted son stands on the same footing as a natural-born son, except that when he co-exists with a subsequently born son, he is not entitled to more than what he, as an adopted son, can take in the family. *Ayyaru Muppanar v. Niladatchi Ammal*, 1 Mad. 45: and the grandson by adoption by a natural born son has the same rights. *Raghubanund Doss v. Sadhu Churn Doss* 4 Cal. 425. But this rule does not apply to *Sudras* amongst whom the adopted son is entitled to an equal share with an afterborn legitimate son. *Raja v. Subbraya*, 7 Mad: 253.

**Illegitimate sons.**

The law on this point is to be founed in *Yajnavalkya*, II. 133, 134 where after laying down rules for persons of the same *jâti*, the author lays down special (rules) of partition of the money of Sudras as follows.

जातोऽपि दास्यां शूद्रेण कामतोंऽशहरो भवेत् । ( १६३ )

मृते पितरि कुर्युस्तं भ्रातस्वर्धभागिकं । अभ्रातृको हरेत्सर्वं दुहितॄणां सुतादृते ।( १३४ ।)

[Even a son begotten by a sudra on a female slave may take a share by the father's choice. But, if the father be dead, the brothers

should make him partaker of the moiety of a share, and one who has no brother may inherit the whole, in default of a daughter's son] II 133, 134. From this text and from the decisions it is now clear, that when a Sudra dies leaving both legitimate sons and *Dasiputras*, they succeed to his estate jointly, and form a coparcenery, so that upon the death of the legitimate sons, the *Dasiputras* take the whole by survivorship. *Sadu v. Baiza*, 4 Bom. 37; *Jojenedra Bhupati Hurri Chundun v. Nityanand Mansingh*, 18 Cal. 151 (**P.C.**) *Ramssaran Garain v. Tekchand*, 28 Cal. 194, *Fakirappa v. Fakirappa* 4 Bom. L. R. 809.

But note—it appears that such a son cannot claim partition as of right. See remarks of their lordships in 18 Cal. 151/155 and Yajna: II. 133. *Quere*: can a grandson through a *Dasiputra* claim?

But he cannot claim partition from the undivided brothers and nephews of his father: *Krishnayyan v. Muthusami*, 7 Mad. 407; *Ranoji v. Kandji*, 8 Mad. 557; *Parvati v. Tirumalai*, 10 Mad. 334; *Karuppa Goundan v. Kumarasami*, 25 Mad. 429, where it was held that the principle in 18 Cal. 151, should not be extended to the case of other collateral heirs, having regard to the rulings in 7, 8 & 10 Madras.

*N. B.* Illegitimate sons of the three higher classes have no right of inheritance or partition. They are only entitled to maintenance.

**A disqualified person** is not entitled to anything beyond maintenance. But a son of such a person, if free from defect, can claim partition. औरसाः क्षेत्रजास्त्वेषां निर्दोषा भागहारिणः । याज्ञवल्कीये २. १४१ (११)

In Bombay, it was held (following *Kalidas v. Kishen*, 11 W.R. 11) that the son of a disqualified son, if born after the death of the grandfather, cannot claim a share. *Bapuji v. Pandurang*, 6 Bom. 616. But in Madras it was held that such a son gets a share, whether born in the life-time or after the death of the grandfather. *Krishna v. Sami*, 9 Mad. 64.

**Minors.**

As regards minors, it is now settled that a partition made during the minority of one or more of the members will be valid, and, if just and legal, will bind him or them. Such a partition is not a matter of course, but is in the discretion of the court. Some malversation, danger or loss to the minors on the one hand or some benefit or advantage on the other, must be proved, before a court will compel partition where all the coparceners are minors. *Bachoo v. Khushaldas*, 4 Bom. L.R. 883 at 888.

*Thangam Pillai v. Subba Pillai* 12 Mad. 401: *Damodar Senabatty*, 8 Cal. 537: *Mahadev Balvant v. Lakshman*, 19 Bom. 99. His interest ought to be represented by his guardian, or some one acting on his behalf, though the fact of his not being so represented would be no ground for opening up the partition, if a proper one in other respects. On arriving at full age, he may have it set aside, as regards himself, if it was illegal, or fraudulent, or grossly negligent, or prejudicial to his interests, or even if it was made in such an informal manner, that there are no means of testing its validity. *Nallappa v. Ballammal*, 2 Mad. H.C. 182. *Lakshimibai v. Ganpat*, 4 Bom. H.C. (O.C.J.) 159. *Damodardas v. Uttamram*, 17 Bom. 271. *Chanvirappa v. Danava*, 19 Bom. 593. His share will not be burdened with the liabilities of his guardian, merely because his guardian committed defalcations in respect of the joint property of the parties to the suit, in the absence of any allegation or proof that the plaintiff (minor) had derived benefit therefrom. *Sonu v. Dhondu*, 28 Bom. 330.

**Absent members** stand on the same footing as minors and their rights extend to their descendants.

**Females.**

A **wife** can never demand partition during the husband's life-time.

A suit by a Hindu wife against her husband to establish her right to a share in his property, and for partition, in the absence of any allegation that he refuses or has ceased to maintain her, is not maintainable. (*Jamna v. Machul Sahu*, I.L.R. 2 All. 315 and *Becha v. Mothina*, I. L. R. 23 All. 86 distinguished). *Punna Bibee v. Radha Kissen Das*, I. L. R. 31 Cal. 476.

A **widow**, under the *Mitakshara*, of an undivided coparcener can never succeed to the undivided interest of her deceased husband. She is only entitled to his separate property. *Kattama Natchiar v. Raja of Sivaganga* 1 P. C. R. 520: except where the separation of her husband has taken place and his share been ascertained, though not actually set apart in specie *Ram Joshi v. Lakshmibai*, 1 Bom. 189.

*N.B.*—In Bengal the case is different. The widows of a sonless Hindu may succeed. But it is a matter within the discretion of the Court in each case. *Soudamini Dossee v. Jogesh Chunder Dutt* 2 Cal. 262.

**Co-widows,** who take a joint interest in the inheritance of their husband, have no right to enforce an absolute partition of the estate between themselves. But where from the conduct of one or more of them, separate possession of a portion of the inheritance is the only means of securing for each peaceful enjoyment of an equal share, an order for separate possession and enjoyment may be made. *Jijoyiamba Barji v. Kamakshi Boyi*, 3 Mad. 424: *Gajapathi Nilamani v. G. Radhamani*. 4 I. A. 212: and subject to these limitations, a widow, being a tenant in common with her co-widows, is entitled as a matter of right, to a share: and the burden of proving exclusion from enjoyment lies on the other side. In such a case, even unchastity after the husband's death would not come in her way. *Sellam v. Chinnammal*. 24 Mad. 441. But she has only a life interest in such a share, and alienation by her will not be operative beyond her life. *Ramakkal v. Ramasami*, 22 Mad. 522. A **mother,** has a right to a share equal to that of a son, when the partition takes place: though by herself she cannot sue for a partition. *Laljit Singh v. Rajcomar*, 20 W.R. 337: *Damodardas v. Uttamram*. 17 Bom. 271: and the share which she obtains is her *stridhan* under the Benares Law, so that, upon her death it passes to her heirs, and not to the heirs of the husband. *Chhiddu v. Naubat*, 24 All. 67; *Sri Pal Rai v. Surjibali*, Ibid, 82. And a step-mother is on the same footing as a mother. *Damoodar Misser v. Senabutty*, 8 Cal. 537. Except in Bengal, a **grandmother** is not entitled to any share.

**Daughter, sister, etc.**

Partition is an incident of a joint family: therefore daughters, and sisters and other females in similar positions are not entitled to any share from the undivided interest of a coparcener. The property remains subject to a charge of defraying the expenses of their *Sanskars e.g.*, marriage.

**Purchasers, assignees etc.**

As a general rule, strangers cannot ask for a partition of the property of the family of which they are not members. But they can do so by right of subrogation under the members as *e.g.*, by purchase, assignment &c.

In **Bengal** and **Allahabad,** an **execution purchaser** of the rights of an undivided member, may demand partition. *Deen Dayal v. Jugdeep Narain*, 3 Cal. 198. But not a purchaser at a private sale.

In **Bombay** and **Madras,** however, a purchaser, **even** at a **private sale,** may demand partition from the coparceners. *Vasudev v. Venkatesh*, 10 Bom. H.C.R. 139:

*Virasami v. Ayyasami*, 5 Mad. 166; and so can even a lessee for a term of years. *Ramasami v. Alagirisami*, 27 Mad. 361.

A donee of an undivided interest does not acquire any right to demand partition. *Baba v. Timma*, 7 Mad. 357; *Gangubai v. Ramanna*, 3 B.H.C.R. (A.C.J.) 66: *Vrandavandas v. Yamunabai*, 12 Bom. H.C.R. 229.

But the Madras High Court has held that a wife, as donee under an ante-nuptial agreement is in the position of a purchaser for valuable consideration, and that, as such she can demand partition of her husband's undivided interest even after his death. *Alamelu v. Rangasami*, 7 Mad. 588.

**Conditions restraining partition**, are generally void and not binding, as tending to create a perpetuity. *Ramalinga v. Virupaksha*, 7 Bom. 538. Such covenents would be binding upon those who are parties to the deed. *Ramdhun Ghose v. Anund Chunder Ghose* 2 Hyde. 93. *Rajender Dutt v. Sham Chund Mitter*, 6 Cal. 106.

But a devise over absolutely to sons coupled with a condition restraining partition for twenty years, would not be upheld as to the latter portion viz. the condition. *Mookund Lall v. Ganesh Chunder*, 1 Cal. 104.

### III. A (1) Property liable to partition.

(*a*) Coparcenery property *i.e.*, property held jointly either as ancestral or jointly-acquired is alone capable of being the subject of partition.

(*b*) Sometimes, self-acquisitions are thrown into common stock: and these as such become then divisible. *Ram Pershad v. Sheo Churn*, 10 M.I.A. 490.

(*c*) Property purchased with money borrowed on the security of common property is also liable to partition. *Rai Narsinga v. Rai Naraina*, 3 N.W.P. 218.

(*d*) Property purchased or held in the name of a single member is presumed to be joint and is liable to partition. *Dharum Das v. Sham Soonderi*, 1 P.C.R. 147.

Where a member of a joint Hindu family, built (at his own expense, with borrowed money) a house upon ground belonging to the family, it was held that each of the coparceners was entitled to a share in the house and the site upon which it was built, equal in value to his share of the site. *Vithoba Bava v. Hariba Bava*, 6 Bom. H.C.R. 54.

(*e*) Property held in *exclusive* or wrongful possession by one member may also be a subject for partition. *Ram Pershad v. Sheo Churn* 10 M.I.A. 490; *Sundar v. Parbati* 12 All. 51.

(*f*) Profits of a prohibited trade, an Equity of Redemption (*Kirty Chunder v. Anath Nath*, 10 Cal. 97), leases from Government though only for a certain number of years (*Dattatraya Vithal v. Mahadaji Parashram* 16 Bom. 528), property, subject to rights of easements by third parties (*Ram Parshad v. The Court of Wards* 21 W.R. 152), and proceeds of sale of a coparcener's share (*Krishnasami v. Rajagopalan*, 18 Mad. 73) have been held to be partible.

**A (II) Property not liable to Partition.**

(*a*) First of all, comes that species of property which is, by its very nature, indivisible *e.g.* articles of wearing, riding horses or idols of worship cannot be divided into exact portions. In one case, the Bombay High Court directed that the family idols should be given in the possession of the Senior member, and the juniors should be at liberty to go and worship them if they liked. *Damodardas v. Uttamram*, 17 Bom. 271.

(*b*) **Self** or **Separate—acquisitions**, and property otherwise acquired without the help of joint funds, are not partible.

In Madras a suit for partition was allowed against a father, of property which had come to him from the father of his adoptive mother. *Vythinatha Ayyar v. Yeggia Narayana*, 27 Mad. 382. Following (*Venkayamma v. Venkataramanayyamma* 25 Mad. 687 (**P.C.**) and *Karuppai Nachiar v. Sankaranarayyan Chetty*. 27 Mad. 300 (**F.B.**)

(*c*) **Impartible Estates** are by their very nature not partible, *Hansapore Case*, 12 M.I.A. 1 *Shivaganga case*, 3 Mad. 290 unless the contrary is found by Special custom. *Jagannath v. Ramabhadra*, 11 Mad. 380.

A **Saranjam,** in Bombay, is ordinarily impartible, and descends to the eldest representative of the past holder. *Narayan Jagannath Dixit v. Vasudev Vishnu Dikshit*, 15 Bom. 247. Where, however, it appeared that the members of a family had treated saranjams as partible, and had dealt with them as such in effecting partition of the entire family estate, which consisted both of incomes and saranjams, it was held that the court was justified in concluding that the saranjams were either originally partible or had become so by family usage. *Madhavrao Manohar v. Atmaram Keshav*, 15 Bom. 579.

(*d*) Where property was vested jointly in several persons as trustees for the management of a temple, it was held that a Civil court was not competent to grant a decree, allowing each by rotation to have

exclusive rights of management and superintendence. *Raman Lalji Maharaj v. Gopal L.M.* 19 All. 428.

As regards hereditary offices, whether religious or secular, these were no doubt treated by the text writers as naturally indivisible : but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property by means of a performance of the duties of the office and the enjoyment of the emoluments by the different coparceners in rotation. *Mencharam v. Pranshankar*, 6 Bom. 298: *Mitakunath Andhicarry v. Neerunjun A* 14 B. L.R. 166.

**B. The time for partition.** Ancestral property may be partitioned at any time, subject to the conditions attaching to the position of members occupying a subordinate position (See I above) *e.g.* sons, grandsons &c.

Of the self-acquired property, (1) the father can effect a partition at any time. (2) But the sons cannot demand partition except (a) when the father is indifferent to wealth and disinclined to pleasure: and the mother is past child-bearing: or (b) when the father is addicted to vice, or is afflicted with a lasting disease.

### IV. The mode of partition.

**Shares.**

Under the *Mitakshara* (1) when the father makes a partition of ancestral property among his sons, they all take equal shares with him, the mother being entitled to one in such a case: if it be his own self-acquired property, he may at his option take a double share for himself and distribute the remainder in such equal or unequal shares as is allowed by law.

2. When the claimants are of different degrees, the division is to be *per-stirpes* अनेकपितृकाणां तु पितृतो भागकल्पना. Yajn: II. 120 (2).

3. When the partition takes place after the father's death, all the sons take an equal share. The special shares allowed in the texts to the eldest are now absolute, and all get equally.

An unequal partition may be made with the consent of sons, and a renunciation of a share is not invalid, when the sharer is involved in debt. *Raja Bishen Perkashd v. Bawa Misser*, 20 W.R. 137. and a relinquishment made by one member in favour of another,

entitles the latter to a double share. *Peddayya v. Ramalingam*, 11 Mad. 406. Where property is acquired by a single member with very slight aid from joint funds, a double share is allottable to the acquirer *Sheo Dyal v. Jadu Nath Tewaree* 9 W. R. 64. But not when the property has been jointly acquired by all the members. *Ram Prasad v. Sheo Charan*. 10 M. I. A. 490. In a partition suit, no coparcener has any right to an account of past transactions. *Narayan v. Nathaji* 28 Bom. 201. N. B. In Bengal under the special peculiarities of the law. a father is the absolute owner. and may distribute as he likes.

**Parties and property should be joined.**

*Secondly*—All members who have a joint interest in the family must be joined; and a suit for partition must embrace all the joint family property. *Shivmurteppa v. Virappa*. 24 Bom. 128. and the partition must be complete.

But a partition may be partial as regards (1) the persons making it or (2) the property divided.

As to persons. any one coparcener may separate from others. but no coparcener, except perhaps the father. can compel the others to become separate amoung themselves. *Kandasami v. Doraisami*. 2 Mad. 317. But all the coparceners are necessary parties to the suit either as plaintiffs or defendants. *Pahuladsing v. Lakshmanabuty* 12 W. R. 256 the shares of some may be separated. while others may remain joint as was the case in *Ganpat v. Gopalrao* 23 Bom. 636. Persons who are entitled to have maintenance are not, but those who take a share in case of a partition. are necessary parties *e.g.* a mother. etc.

A mortgagee of a share though not a necessary party, may be allowed to take part in the suit as far as it affects his interest. *Mohindro v. Shoshee*, 5 Cal. 882; but a mere creditor cannot intervene and ask that his debt may be distributed in a particular way. *Velligammal v. Katha*, 5 Mad. 61.

Strangers to the family who have obtained an interest in the family property by right of purchase or mortgage are also necessary parties to the suit. *Sadu v. Rama*. 16 Bom. 608.

A question would arise as to the status of persons, who were parties to a general suit by one member, but who, after the share of that

member was taken away, remain joint. In strict theory, this would be a case of partition and re-union. Mr. Mayne, however, thinks that the proper presumption in such a case would be, that there never had been any severance at all. (Page 648 sixth edition.) See also *Manjanatha v. Narayana*, 5 Mad. 362.

Their lordship of the Privy Council have, however, in a recent case, remarked, that there is no presumption when one co-parcener separates from the others, that the latter remain united. The separation of one may be said to be the virtual separation of all. And an agreement amongst the remaining co-parceners to remain united or to reunite must be proved like any other fact. *Balabux v. Rukhmabai*, 30 Cal. 725 (**P.C.**).

**General rule.**

As regards **property**, it must embrace the entire property, and a suit for a portion only of the joint family property, cannot lie. *Nanabhai v. Nathubai*, 7 Bom. H. C. R. 47; *Trimbuk v. Narain*, 11 B.H.C.R. 71: *Jogendranath v. Jugo Bandhu Mukerji*, 14 Cal. 122. But this rule is subject to certain qualifications as *e.g.* (**1**) where different portions of it are situated in and out of British India—*Ramchandra v. Anantacharrya*, 18 Bom. 389, or (**2**) where a portion of it is not immediately available for partition (*a*) by reason of its being in the possession of mortgagees, or (*b*) because it was Inâm land which required Government permission to give courts jurisdiction. *Hari Narain v. Ganpatrao*, 7 Bom. 273: *Narayan v. Pandurang*, 12 Bom. H.C.R. 148: *Kristayya v. Narasimham*, 23 Mad. 608; *Balakrishna v. Hari* 8 Bom. H. C.R. 61 or (**3**) or where property is held in partnership by the joint family along with strangers, who have no interest in the family partition among the shares, and who could not, therefore, be made parties in the family partition suit: *Purushottam v. Atmaram* 23 Bom. 597, or (**4**) where the suit is for partition of only certain property, which had once been the property of the joint family as a whole, but which at the time of the suit had come to be the joint property of the plaintiff and the defendant only, it is not necessary to include the whole property in the claim. *Lakshmi Narayan v. Janki Das*, 23 All. 216, cf. also *Subbaraya v. Rajaram*, 25. Mad. 585. In. *Ramasami Chetti v. Alagirisami Chetti*, 27 Mad. 361.

**Exceptions.**

Plaintiff sued for partition of 100 kulis of land situated in the village of A. This village was, in 1883, in the possession of the second, ninth and tenth defendants

and one L. as tenants in common and second defendant's share was one-half and the share of the others was one-sixth each. In 1887, the tenth defendant's one-sixth share and interest in the entire village (including the 100 kulis) was attached in execution of a decree against him. His interest in the 100 kulis was sold and purchased by the present first defendant, whilst one-half of his share in the rest of the village was purchased by the decree-holder N. In 1889 and 1891, respectively, N similarly purchased the one-sixth share in the village, including the 100 kulis, of L and of the ninth defendant, respectively. In 1894, N sold the entire interest acquired by him in the village to A, who, in 1897, sold the same in equal moieties to the ninth and tenth defendants. In 1897, plaintiff obtained a lease from second defendant of her one-half share in the entire village, exclusive of the 100 kulis, for a term of twenty-three years, and a similar lease from ninth and tenth defendants of their interest (amounting together to one-half share) in the village, without reservation. Plaintiff now sued for partition of the 100 kulis. His case was that by his leases he had acquired a right to the exclusive possession for twenty-three years of the entire village, exclusive of the 100 kulis, and that in respect of the latter he was entitled to joint possession for the same period with the first and second defendants (the shares of the three being respectively one-third, one-sixth, and one-half), and that as he did not like such joint possession he desired a partition of his one-third share:—*Held*, that plaintiff was entitled to have partition, though he was only lessee for a term of years, and though that partition could only last for the period of his lease. The suit was not one for partial partition inasmuch as plaintiff was not entitled to partition of the rest of the village, to which he was entitled to exclusive possession, under his leases for twenty-three years. The only portion of the village he could demand partition of was the 100 kulis, to which he was only entitled to possession jointly with the first and second defendants.

Though there cannot be a partial partition by suit, such a one is possible by arrangement. *Kattama Naickar v. Raja of Shivaganga*, 1 P.C.R. 520.

A suit for partition cannot be dismissed on the ground that plaintiff has not brought into hotchpot every divisible property in his hands. *Janardan v. Anant*, 7 Bom. 373 ; *Hari v. Gopal*, 7 Bom. 273.

### V. What constitute's Partition ?

No writing is necessary. Numerous circumstances are set out by the text writers as being more or less conclusive of a partition having taken place, such as, separate food, dwelling, or worship ; separate enjoyment of property, separate income, expenditure etc. But all these circumstances are merely evidence, and not conclusive evidence of the fact of partition. The mere fact that some members live separated, will not establish partition, unless it was done with a view to live separately. *Timbai v. Krishnaji*, 6 Bom. L.R. 357. Generally, no doubt, two things are necessary to constitute a partition.—(1) The shares must

be defined, and (2) there must be a distinct and independent enjoyment. *Sheo Dyal v. Jadoonath.* 9 W.R. 61.

An actual partition by metes and bounds, is not necessary to render a division of undivided property complete. But when the members of an undivided family agree among themselves, with regard to particular property, that it shall henceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with: and each member thenceforth has in the estate a definite and certain share which he may claim the right to receive and enjoy in severalty, although the property itself has not been actually severed and divided. *Apporier v. Rama Subba Aiyan,* 11 M.I.A. 75: *Kulponath v. Mewah Lal,* 8 W.R. 302.

**Appovier's case.**

An agreement for partition, though not carried out by actual partition of the property, is sufficient to constitute a division of the family, so as to entitle the widow of a deceased brother to succeed to his share of the ancestral property in preference to the surviving brothers. *Suraneni Venkata Gopala Narasimha Roy v. Suranani Lakshmi Venkama Roy,* 13 M.I.A. 113. *Anant Bhalchandra v. Damodar Makund,* 13 Bom. 25.

And even an agreement that each party should enjoy the proceeds of a certain definite share of the joint property was held sufficient. *Ashabai v. Tyeb Haji,* 9 Bom. 115. And where it was found that the several branches of the family had enjoyed shares for a long time, it was taken to be sufficient evidence to establish a tacit agreement of enjoyment of separate shares. *Murari Vithoji v. Mukund Shivaji,* 15 Bom. 207. *Balkishen Das v. Ram Narain,* 30 Cal. 738 **(P.C.)**.

Where it was found (1) that the result of former litigation had been to ascertain the shares of individuals of a Hindu family, and that, although there had been, from the nature of the property, no partition by metes and bounds, there was a numerical division by which the share of each member was fixed, and (2) that petitions by various members under the Land Registration Act, clearly indicated individual and not joint ownership, it was held, that, looking at the conduct of the parties, in order to arrive at their intention as to separation, and at the whole circumstances of the case, that (notwithstanding the imperfect form of the decree), a separation of the joint family was established. *Ram Pershad Singh v. Lakhpati Koer,* 30 Cal. 231. **(P.C.)** See also *Jirubai v. Krishnaji,* 6 Bom. L.R. 351.

**Partition decrees:** As in private partition, so in a partition decree also, separate provision has first to be made for all the *charges* that exist as against the estate. These include the expenses of marriage of unmarried females, the maintenance of those who are not entitled to any share or partition, and the payment of debts contracted for joint purposes. Where there are several persons who have acquired any claim against the estate, their rights should be determined with reference to the date of partition and not with reference to the dates of several transactions. *Udaram v. Ranu*, 11 Bom. H.C.R. 76; *Gurulingappa v. Nandappa*, 21 Bom. 797; and *Aiyyagari, v. A.* 25 Mad. 690. " Prior purchasers or incumbrancers are, as far as possible, entitled to priority, but not as a matter of right. It is only an equity, and the question how and where the equity should be invoked in aid of a party must depend upon equitable considerations which, again, must depend on the circumstances of each case." per Chandavarkar J. in *Narayan v. Nathaji*, 28 Bom. 201, and in the case of decrees based on awards, the date of partition is not the date of the decree, but of the award. *Subrayya v. Sadashiva*, 20 Mad. 490.

**Effect of.**

In *Lakshman Darku v. Narayan*, 24 Bom. 182, the decree provided that certain payments should be made to a minor member during minority and on his attaining majority, a certain definite share was to be given to him. On a suit by the widow of the minor who died during his minority, it was held that the effect of the decree was to earmark the share of the minor.

But a decree merely directing to divide, without more, is undistinguishable from an agreement of that nature and has no legal effect of effecting a complete partition. *Babaji v. Kashibai*, 4 Bom. 157. Such a decree has not any effect so long as it is under appeal. *Sakharam v. Hari*, 6 Bom. 113.

**Reopening of Partition :** As a general rule, a partition once made cannot be reopened. *Moro Vishwanath v. Ganesh* 10 Bom. 451, and if made in a proper and lawful manner, it may be binding even on minors. *Nallappa v. Balammal*, 2 Mad. 182 : unless he can show, upon attaining majority, that it was made in an informal manner, or was fraudulent and illegal. *Kalee Sankur Sanyal v. Dinendra Nath Sanyal* 23 W.R. 68. *Krishnabai v. Khangowda*, 18 Bom. 197.

## VI. Reunion and its Effects.

**Who can reunite?** According to the *Mitaksharu and Dáyabhága citing Brihaspati*, reunion can take place only between the father, brother and nephew (विभक्तो यः पुनः पित्रा भ्रात्रा वैकत्रसंस्थितः । पितृव्येणाथवा प्रीत्या सतत्सं सृष्ट उच्यते) The *Viradachintamani* regards this list as *illustrative* and not *exhaustive*. The *Mayukha* agrees in this view, so far as to hold that other persons, besides those named therein may re-unite. But it restricts the possibility of re-union to the persons who made the first partition (See Mandlik. P. 56 ll. 2-4) See also *Bala bux v. Rukhmabai*, 30 Cal. 725 (**P.C.**)

*Semble*—an agreement to reunite cannot be made during the minority of a person on his behalf. *Ibid.*

**Effect of Reunion:** There is a difference between the interest in property held by an originally undivided member and by one who has re-united after partition. In the former case, there has been no ascertainment of his share. In the latter case, his share has been ascertained and continues to be so ascertained after re-union. The reunion only destroys the exclusive right which he acquired by partition in the property which had fallen to his share. His position is that of a joint-tenant before partition, a sole-tenant after partition, and a tenant-in-common after reunion. After re-union his share is held in quasi-severalty, and at his death, it passes by descent, under the special rules, and not by survivorship. Another effect of re-union is on the law of succession, (which see).

**Examination : short summary.** Partition is the adjustment of the rights of the several members of a joint Hindu family. It may be claimed by any coparcener at any time. Except in Bombay even sons and grandsons may demand partition of ancestral property from their father and grandfather. A minor son is concluded by any arrangement at separation arrived at during his minority and cannot question it unless it is informal, illegal or fraudulent. Illegitimate sons of the three higher classes are not entitled to any share. Of the Sudras they are entitled to an equal share, but cannot of right claim it during father's life-time. A wife can never ask for a partition, even for her maintenance, unless, it is expressly refused. Widows taking together may ask for and obtain partition and hold their shares for their life-time. A purchaser may ask for a general partition and have then his lien enforced. No condition restraining in present or future the right of partition, is valid. All property

which is known as coparcenery property may be liable to be partitioned. But impartible or self-acquired property, or property in its nature indivisible may not be partitioned. Partition must be complete and every suit must have on record either as plaintiffs or defendants, every member and must include the whole joint family property. For a complete partition, no writing is necessary. Separation of shares and separate enjoyment are essential. Even an agreement to divide is enough. Partition severs the tie of coparcenery and after it, only certain persons can re-unite. According to the *Mayukha* any one may re-unite.

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QUESTIONS: 1. Define partition, and state who are entitled to partition? Can a son ask for a partition during the father's life-time? Discuss fully and cite cases. What is the mode in which partition is effected?

2. When can a partition be demanded? "A suit for partition must embrace the whole of the property" What are the exceptions to this?

3. What are the essentials of a valid partition? Can any conditions restraining this right be allowed?

4. Who are entitled to re-unite and with what effect?

# CHAPTER X.

# Maintenance.

## I. Who are entitled to maintenance?

वृद्धौ च माता पितरौ साध्वी भार्या सुतः शिशुः । अप्यकार्यशतं कृत्वा भर्तव्या मनुरब्रवीत् ॥

[Aged parents, a virtuous wife and an infant son must be maintained, even by doing a hundred avoidable (Lit. that which ought not to be done) things. So said Manu].

From this and other texts, the following persons are entitled to maintenance **Parents**: a father and mother are under all circumstances, entitled to maintenance from the son. Of these, the **father's** right is absolute: a **mother's** is similar and when the son has received assets of the father, he is under an imperative duty to maintain her. Her right depends upon the same footing as that of the father, and want of chastity does not deprive her of that right. She is entitled to be maintained out of joint family property, and if anything is done with it affecting that right *e.g.*, sale of the property, her right comes into existence: and the purchaser has the same rights and takes it subject to the same liabilities as those of the person from whom he purchased. *Jogendra Chunder v. Fulkumari*, 27 Cal. 77: *Amrita Lal Mitter v. Manick Lall, Ibid* 551. A **Step-mother** is not entitled to be maintained by a step-son independently of the assets of the family in his hands. *Bai Daya v. Natha Gobind Mal*, 9 Bom. 279. *Narayanrao v. Ramabai*, 3 Bom. 415. A grand mother is entitled to maintenance. *Pudumorkee v. Rangeemonee*, 12 W.R. 409. A **mother-in-law** is not entitled to be maintained by the daughter-in-law who has no ancestral funds in her hands. *Bai Kanku v. Bai Jadav*, 8 Bom. 15.

**Mother.**

A **wife** is always entitled to maintenance from her husband, even when he has become a convert to another religion. *Manshe Devi v. Jiwan Mal* 6 All. 617. Where, however, by special custom a wife remains at the abode of her parents till she reaches the age of maturity, as in Madras (See above P. 45), the husband is not liable to pay the expenses of her maintenance.

**Separate maintenance.** Although by Hindu Law a husband is bound to maintain his wife, she is not entitled to a separate maintenance from him, unless she prove misconduct or any other justifying excuse. *Sidlingapa v. Sidava*, 2 Bom. 634.

**Cases where Separate maintenance was allowed**: (1) upon the husband changing his religion. *Mansha Davi v. Jiwan Mal*, 6 All. 617.

(2) when he habitually treats her with cruelty and such violence as may create serious apprehensions for her personal safety. *Matangini Dasi v. Tojendra Chunder Mullick*, 19 Cal. 84. Under such circumstances, even the wife of a junior member in a joint Hindu family may claim separate maintenance, if the mother-in-law and sister-in-law treat her so badly as to endanger her personal safety. *Yamunabai v. Narayan Moreshwar*, 1 Bom. 170. (3) Where the husband is guilty of gross misconduct, *e.g.* Keeping a Mahomedan mistress and compelling the wife to leave his house. *Lala Gobind Prasad v. Dowlat Batti*, 6 B.L.R. 85: 14 W.R. 451 also cf. Manu IX 79.

**Cases where separate maintenance was not allowed:** (1) a wife leaving her husband without a justifying cause—here on the husband's marrying a second wife—was not allowed separate maintenance. *Virasami v. Appasami*, 1 Mad. 375 (2) unchastity or adultery is another ground upon which maintenance is not allowed. *Illata Sastri v. I Narayan*, 1 Mad. 372.

A woman divorced for adultery during her husband's life, and who had continued in unchastity after his death, is not entitled to maintenance out of her husband's property: *Muttammal v. Kamakshy*, 2 Mad. 337; *Kandasami v. Murugammal*, 19 Mad. 6.

In a recent case at Allahabad (*Kallu v. Kaunsilia*, 26 All. 326) a wife who was living in adulterous intercourse, and had a son from it, was allowed maintenance on the ground that for two years previous to the suit, the woman had established a clean record. (This case was decided by the court in its Criminal Jurisdiction under S. 488 Criminal Pro. Code.)

A woman living in adultery, formed a temporary connection with a man by whom she had a son, was not allowed maintenance. *Sikki v. Vencatasamy*, 8 Mad. 144.

**Widows**: A widow is entitled to be maintained from the joint ancestral estate of the family of which her husband was a member. *Lalti Kuar v. Ganga Bishan*, 7 N.W. 261. The relations of the deceased husband are under no personal obligation to maintain her apart from any assets in their hands. *Savitribai v. Luxmibai*, 2 Bom. 573; *Apaji Chintaman v. Gangabai*, 2 Bom. 632. unless they have property of the husband in their hands. *Ramabai v. Trimbak*, 9 Bom. 283.

(*b*) **Widowed daughter-in-law.** A father-in-law is not under any legal obligation to maintain a widowed daughter-in-law. *Savitribai v. Luximibai*, 2 Bom. 573; *Janki v. Nandram*, 11 All. 194; *Kalu v. Kashibai*, 7 Bom. 127. It is only a moral duty. But this duty becomes legal

when the estate passes into the hands of his heirs etc. when she is entitled to maintenance from them *Devi Persad v. Gunwunti Koer*, 22 Cal. 410. Accordingly, it has been held that a daughter-in-law is legally entitled to be maintained by her mother-in-law having in her hands assets of the father-in-law. *Yamunabai v. Manubai*, 23 Bom. 608. But she cannot claim any maintenance from his devisee. *Bai Parvati v. Tarwadi Dolatram*, 2 Bom. L.R. 894.

(*c*) A **Sister-in-law** is entitled to be maintained by the brother of her deceased husband, if he holds ancestral property or property belonging to his deceased brother. *Adhibai v. Karsandas*, 11 Bom. 199; but not if there is no property. *Janki v. Nandram*, 11 All. 194.

And **Generally** a widow's right to maintenance is exactly on a footing with that of a wife, with this difference, that whereas a husband would not have been bound to give invariably separate maintenance to the wife, his successor holding assets from his property would be bound as such holder to give maintainance to the widow though she may have been discarded by him during his life-time. *Rambhat v. Trimbak Gunesh Desai*, 9 Bom. 283. And she may claim maintenance and ask to be free to live separately. *Rango Vinayak v. Yamunabai*, 3 Bom. 44: *Narayanrao v. Ramabai*, 6 I.A. 114; *Ramchandra Vishnu Bapat v. Sagunabai*, 4 Bom. 261; *Kasturbai v. Shivagiram*, 3 Bom. 372. But where the family income was too small to admit of an allotment to a widow of a separate maintenance, and there was no family house, but a small portion of the land which was the site of a house, it was held, that she was not entitled to a separate maintenance, but might be allowed, if she so desired, to occupy during her life-time a portion of the land, not exceeding one-third. *Godavaribai v. Sagunabai* 22 Bom 52.

Where, however, her husband has directed that she shall be maintained in the family house, she is not entitled to a separate maintenance. *Girianna Murkundi Naik v. Honama*, 15 Bom. 236. unless she shows "just cause" for not living in the family house. (in this case-an attempt to blacken her character). *Mulji Bhaishankar v. Bai Ujam*, 13 Bom. 218.

**Unchastity a bar.**

It was held in *Honama v. Timannabhat*, 1 Bom. 559 that a widow was not to be deprived of her right of maintenance under a decree by subsequent unchastity. But this case has been dissented from in *Valu v. Ganga*, 7 Bom. 84 and it

has since been held that subsequent unchastity works a forfeiture of all rights the widow had for maintenance. *Vishnu v. Manjamma*, 9 Bom. 108; *Daulatakuari v. Meghu Tiwari*, 15 All. 382: *Nagamma v. Virabhadra*, 17 Mad.392; *Ram Nath v. Rajonimony Dossy*, 17Cal. 674.

**Daughter** : a daughter living apart from her father for no sufficient cause, is not entitled to any maintenance. *Hata Shavitri v. Hata Narayan*. 1 Mad.372, and it is only the unmarried daughters who have a legal claim for maintenance out of their father's assets. The married daughters must seek provision from the husband's family. If this provision fails, and the widowed daughter returns to the family of her birth, there is a moral and a social, but not a legal, obligation to maintain her. *BaiMongal v. Bai Rukhmini*, 23 Bom.291: and following this case, it was held in Calcutta, that a sonless widowed daughter is not entitled to separate maintenance out of her father's estate which has descended to his heirs. *Mokhada Dasee v. Nundoo Lall*, 28 Cal. 278. "It may be a matter for consideration hereafter, whether, having regard to the dicta of Peacock C. J. in *Khetramoni Dasi v. Kashinath Das*, 2 B. L. R. A. C. 15, the case in 23 Bom. 291 has not gone a little too far in saying that there is no legally enforceable right by which a widowed daughter's maintenance can be claimed as a charge on her father's estate in the hands of his heirs". Per Maclean C.J. in 28 Cal. 278 at 288.

**Concubine.** A concubine may claim maintenance if the intercourse is continuous. *Yashwantrao v. Kashibai*, 12 Bom. 26. But continued continence is a condition precedent, and she gets no right of maintenance against her paramour, unless, having been kept continuously till his death, it can be said that the connection had become permanent. It is only on his death that his estate in the hands of those who take it becomes liable for her maintenance. *Ningareddi v. Lakshmana*, 26 Bom. 163. And a woman continuously kept for sometime, and then discarded, is not entitled to claim maintenance from him. *Ramanarasu v. Burhamma*, 23 Mad. 282.

**Son.** A father is not bound to maintain a grown up son, either under the Hindu or Jain law. *Premachand v. Hulas Chand*, 12 W.R. 494. In any case such a son can claim no maintenance out of the father's self-acquisitions *Ammakannu v. Appu*, 11 Mad. 91.

He can, however, successfully claim maintenance from ancestral estate which is impartible. *Himmatsing Becharsing v. Ganpat Singh* 12 Bom. 94. One whose adoption is invalid is entitled to maintenance from the adopter's family. *Ayaru Muppanar v. Niladatchi Ammal*, 1 Mad 45. But the adopted son of one whose alleged adoption has been held invalid can make no claim through his adoptive father to be

maintained by the alleged adopter. *Barani Sankara Pandit v. Ambabay Ammal*, 1 Mad. 363. An illegitimate son is entitled to bare maintenance among the twice-born classes. *Inderan Valungypuly v. Ramaswamy*, 13 M.I.A. 141 *Sakharam v. Ram krakad Vithal*, 1 Bom.191; *Ananthaya v. Vishnu* 17 Mad. 160. But this right is purely personal, and cannot be claimed by the children of such illegitimate children. *Roshan Singh v. Balwant Singh* 22 All. 191 (**P.C.**) 27 I.A. 51.

But the woman, upon whom the illegitimate son was begotten, must be a Hindu, and the son of a non-Hindu (*e.g.*, a Christian) woman will not be entitled to maintenance. *Lingappa v. Esudasan*, 27 Mad.13.

The younger members of an impartible estate are entitled to be maintained out of the estate by the elder member in charge. *Fatesingji v. Kuar Harisingh*, 20 Bom. 181: *Yarlagarda Malikarjuna v. Durga Prasad*, 24 Mad. 147 (**P.C.**).

II. **Nature of the right:** The right to claim maintenance is a purely personal right and does not pass to the heirs. It is moreover a mere right, and does not become a charge unless made so by agreement, award or adjudication. And *bona fide* purchasers for value may prevail over this right, even when the purchase is made with knowledge of the existence of this right, unless it is proved that the sale and purchase was made with the intention of defeating this right. *Lakshman v. Satyabhamabai*, 2 Bom. 494. *Ram Kuar v. Ram Doy*, 22 All. 328: *Bhartpur State v. Gopal Day*, 24 All.160. S.39 of Act IV of 1882.

**Amount claimable:** No exact rule can be laid down as to this. Every case has to be judged of by special reference to its own facts. A widow, however, would never be entitled to more than the annual proceeds of the share which would have fallen to her husband's lot, had a partition taken place in his life-time. *Madharrao v. Gangabai*, 2 Bom. 639: on the other hand she will not get less than one third of the income of such share. *Adibai v. Cursondas*, 11 Bom. 199: *Ramabai Trimbak*, 9 Bom. 283.

Her maintenance is not to be determined with reference to the principle that she is enjoined to live the life of an ascetic. *Baisni v. Rup Singh*, 12 All. 558; that is a purely moral rule, and not a rule of law and in determining the amount, the court should take into consideration not only the reasonable wants of a person in her position of life, but also the means of the family of her husband. *Devi Persad v. Gunwanti Koer*, 22 Cal. 410.

"The principle which should govern the Court in fixing the rate of maintenance to a Hindu widow is this:—The mode of life of the family during her husband's life-time should be ascertained and the amount to be fixed must be sufficient to allow the widow to live, as far as may be, consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had

in her husband's lifetime. Then must be looked into, what the estate of the husband is and how far that estate is sufficient to supply her with maintenance on this scale, without doing injustice to the other members of the family, who also have their rights as heirs or their rights to maintenance out of the estate. Though this is the principle which usually guides the Courts, it is exceedingly difficult to apply it in practice to individual cases. So, what has been done in one case is no guide to Courts as to what they should do in other cases. In the present case, the husband was a man of very considerable property and there was nothing to show the extent of his expenditure. The minimum income of the estate appeared to be twenty seven thousand rupees a year and the number of persons, who could reasonably become burdens upon the estate was extremely small. The amount fixed was, thus, not at all excessive in proportion to the income of the estate. Objections disallowed and the report of the Registrar confirmed." *Per Wilson J in Sm. Karoonamoyee Dabee v. The Administrator-General of Bengal*, 9 C.W.N. 651.

An illegitimate member of a family, who is not entitled to inherit, can be allowed only a compassionate rate of maintenance and cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females who have become members of the family by marriage. But regard should be had to the interest which the deceased father of the illegitimate son had in the joint family property and the position of his mother's family. *Gopalasami Chetti v. Arunachellam Chetti*, 27 Mad. 32. In calculating the amount of maintenance, her own *Stridhan*, given by the husband's family, should be taken into consideration. *Savitri Bai v. Luxmibai*, 2 Bom. 573. See also, *Dalel Kunwar v. Ambika Partap Singh*, 25 All. 266.

**Variation or cancellation of the Decree:** The decree may be altered, *i.e.*, an increase, as well as, a decrease in the amount awarded may take place, according to the changes in the circumstances of the family and a suit will lie for such a change. *Gopikabai v. Dattatraya*, 24 Bom. 386. The allowance may even be stopped *e.g.*, upon the unchastity of a widow etc.

**Arrears of mainten ance.** No rule of Hindu Law precludes the recovery of arrears of maintenance, the only bar to a suit for arrears being the law of Limitation. *Venkopadhyaya v. Kavari Hengusu*, 2 Mad. 36 ; *Jiri v. Ramji*, 3 Bom. 307.

Under the Limitation Act (XV of 1877) no more than twelve year's arrears of maintenance can be recovered at any time (art. 128 Sch. II). So long as there is no denial of the right, limitation does not run against the plaintiff. *Ramanamma v. Sambayya*, 12 Mad. 347. There must be a demand and refusal and in a suit for arrears the plaintiff must prove that there was wrongful withholding of the maintenance. *Mallikarjuna Prasada v. Durga Prasada*, 17 Mad. 362. Where no demand is proved to have been made, no arrears will be allowed. *Seshamma v. Subbarayudu*, 18 Mad. 403. See also *Bhagirathi v. Anathachar*, 17 Mad. 268. Past non-payment does not necessarily give a right of action: it is a prima facie proof. Where the evidence shows that the holder of the estate

was unwilling to pay and denied the right, that *prima facie* proof is not rebutted. *Varlagurda Mallikarjuna v. V. Durga Prasad*, 24 Mad. 147.

The right to maintenance is one accruing from time to time : *Narainrao v. Ramabai*. 6 I. A. 118 : it is a constantly recurring right *Venkopadhyaya v. Kavari*. 2 Mad. H.C.R. 36: and arrears can be claimed for the time before suit allowed by limitation, although previous years may be barred. *Jiri v. Ramji*. 3 Bom. 207.

But if the right itself is denied, then a suit for its establishment must be brought within twelve years of its denial, or the right will be lost and with it the entire claim. Once it is established, it cannot be lost, and limitation will then only affect the claim for arrears. *Chhaganlal v. Bapubai*. 5 Bom. 68: *Gajpat v. Chimman*, 16 All. 189.

As to how much of the claim for arrears can or should be granted, it is purely a matter that rests within the discretion of the court, and in allowing it, it will not necessarily allow arrears at the same rate as it may allow future maintenance, especially where plaintiff has made serious delay in bringing her suit for maintenance. *Raghubans Kunwar v. Bhagwant Kunwar*, 28 All. 183. In 27 Mad.33 (See above Page 155) the Court allowed arrears for *nine* years previous to the suit.

A childless Hindu widow adopted a son to her husband and thereby divested herself of the husband's estate. Sometime after, she brought a suit against her adopted son for maintenance with past arrears. *Held*, the plaintiff not having left the family-house for any immoral purpose, her right to a separate maintenance could not be disputed. Though non-payment of maintenance does not necessarily give a right of action for arrears, still it would constitute *prima facie* proof of wrongful withholding. Under the circumstances of the case, a monthly allowance of Rs. 80 with past arrears at that rate, was held suitable. *Raja Ratan Sing v. Rani Beni Bai*, 1 N.L.R . 33.

**Arrears are saleable, and heritable.**

Though the right to maintenance cannot be sold, or passed on to the heir, a claim for arrears is perfectly saleable and heritable. *Hoymobutty Debia v. Koroona Moyee Debia*. 8 W.R. 41 and arrears due at the death of the person entitled may be seized in execution of decrees against the decease *A. P. Raja Rao Chandra Rao v. Nana Row Krishna*. 11 Bom.528, followed in *Luxmibai v. Ganesh*. (S.A. 1760 of 1904 Bom. H.C. unreported.

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**Examination Questions**, 1. Who are entitled to maintenance and under what circumstances ?

2. How far maintenance is a charge upon the property liable to pay the amount? What is the exact nature of the right to claim arrears ? Explain how far it depends upon the right of claiming maintenance itself?

3. Estimate the effect of unchastity upon the right to claim maintenance in the case of a mother, wife, and other widows.

4. Who can claim separate maintenance ? Can a wife ever claim it?

# BOOK IV.

## The Law of Succession.

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### Preliminary Observations.

The Second and the Third Books dealt with the Laws of Status and Property respectively. This book treats of the combination of these two *i.e.*, the rights of persons to property belonging to others, either by act of parties—by previous preparation—or by operation of Law. When the succession is regulated by act of parties—by deliberate preparation before hand, it is called "*Testamentary*," giving rise to the Law of wills. When it is not so arranged by premeditated acts, it is called "*Intestate*" succession. Now in this latter case the deceased may either be a *male* or *female;* when the property is that of a female it may be her absolute property over which she has unlimited power of disposal, or it may be one in which she may have only a limited interest. Of the persons who take under an Intestate Succession, there may be some who take absolutely, others whose interest in the property is only limited either by a term or by circumstances or by both, while there are still others who never can take at all. All these subjects will be considered in this Book, in the three chapters following, in the order mentioned below.

Chapter XI. Succession to the property of a male, with the Law of exclusion from Inheritance.

Chapter XII. Succession to the property of a Female, including
A.—Woman's estate generally.
B.—Stridhan, what it is and its kinds.
C.—Succession to Stridhan.

Chapter XIII. Testamentary succession.

## CHAPTER XI.

# Inheritance to property of a male.

**Inheritance, succession, survivorship.** As opposed to and contradistinguished from each other, one (succession) covers a wider area of which only a part is affected by the other (inheritance). Inheritance is derived from the Roman *heres;* an heir; takes by inheritance, but a successor may take also under a will or other arrangement. The difference between realty and personalty of English Law is also based on this distinction.

The law of inheritance according to the *Mitakshara* applies only to the separate property of a deceased person. When a man dies as a member of a joint family, his interest in the joint estate is extinguished by his death, and the surviving co-parceners, whoever they be, whether sons, brothers, or nephews, continue in possession, as if the deceased never existed. *Devi Prasad v. Thakur Dyal,* 1 All. 105. (**F.B.**).

When, however, property came to belong exclusively to its possessor as being his own self-acquired, or in consequence of his having separated himself from all his coparceners, or having become the last of the co-parcenery, then it passes to the heir properly so called.

The Law of inheritance can have application only when the property was held exclusively by the deceased as his own absolute severalty.

**General rules:** (1) **Succession never in abeyance:**— The right of succession cannot, under any circumstances be held in abeyance, in expectation of the birth of a person who, if then in existence would have been a preferable heir.

**Exceptions:**—(**1**) A child in the mother's womb at the time of the death is considered to be in existence. (In Bengal, it was held that proprietory right is created by birth and not by conception. *Mt. Goura Chowdrain v. Chummon Chowdry,* W.R. for 1864, p.340; but in Bombay it was held that a posthumous son succeeds by survivorship in the same manner as a son born during the life-time of the father, and that his right cannot be interfered with by a testamentary disposition. *Hanmanta v. Bhimacharya,* 12 Bom. 105.

(**2**) Under certain circumstances, a son adopted by a widow divests the estate vested in her.

**Presumption as to death: Missing persons:** — The question whether a missing person should be presumed to be dead is not "part of the substantive law of inheritance, but has to be decided under the Indian Evidence Act (S. 108). *Dhondo v. Ganesh*, 11 Bom. 433; *Balaji v. Kristnappa*, 11 Mad. 448; *Parmeshwar v. Bisheshwar*, 1 All. 53. Death is to be presumed after a certain interval (seven years); but there is no presumption as to the time of death. If, therefore, any one has to establish the precise period during these seven years at which a person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the continuance of life. There is no presumption of law that because a person was alive in 1877 therefore he was alive in 1878. *Dharup Nath v. Govind*, 8 All. 614; *Rango Balaji v. Mudiyeppa*, 23 Bom. 296.

## A: Course of Inheritance under the Mitakshara.

पत्नी दुहितरश्चैव पितरौ भ्रातरस्तथा । तत्सुतो गोत्रजो बन्धुः शिष्यः सब्रह्मचारिणः ॥
एषामभावे पूर्वस्य धनभागुत्तरोत्तरः । स्वर्यातस्य ह्यपुत्रस्य सर्ववर्णेष्वयं विधिः ॥

Yajnavalkya II. 135, 136.

"The wife and the daughters also, (both) parents, brothers likewise, and their sons, gentiles, cognates, a pupil and a fellow student. On failure of the first among these, the next in order is indeed heir to the estate of one who is dead (Lit: has gone to heaven), leaving no male issue. This rule extends to all persons and classes "Col. Mit: II, I.

From this, the course of inheritance would be as follows:— (1) Issue *i.e.* son, grandson great grandson. (2) Widow. (3) Daughters (4) If Daughter's son. (5) Parents. (6) Brothers. (7) Nephews. (8) Grandmother. (9) Sister (in Bombay) (9) Grandfather, (10) Uncles (11) Uncles' sons (12) Great-grand parents. (13) Their sons and (14) grandsons (15) Further Gotrajas. (15) Bandhus. (17) Preceptor (18) Pupil, fellow-student &c.

**Note:**—(1) Succession applies only to estates in severalty. (2) Each one of the successors in the above list, takes in default of the preceding heir. (3) If the estate has once vested in any male, he becomes a fresh stock of descent; and on his death, the devolution of his estate is determined by reference to the law of survivorship or of inheritance according as he has left undivided co-parceners or not. (4) Where the estate has vested in a female or any number of females in succession to each other, on the death of the last, descent is traced to the last male holder, except in certain cases under the Bombay Law.

1. **Issue** (*i.e.* son, grandson and great grandson in order). If a man has become divided from his sons, and has subsequently one or more sons born to him, he or they take his property absolutely and exclusively. *Narál Sing v. Bhagwan Sing*, 4 All. 427. In the absence of an undivided son, a divided son is entitled in preference to the

widow. *Ramappa Naicker v. Sithammal*, 2 Mad. 182. But as between united and separated sons, the former exclude the latter entirely. *Bajee v. Venubai*, Bom. H.C.P.J. No. 41 of 1872.

The effect of a son's relinquishing, for a sum of money, his interest in the property of a father, natural or adoptive, and agreeing not to claim it during his life-time or after his death, is to place him in the position of a separated son. If the father, after such relinquishment by the son, makes an alienation of the estate it would take effect; but otherwise, his separated son will inherit in preference to his widow. On the disinherision of the son, his son becomes his grandfather's lawful heir. *Balkrishna v. Savitribai*, 3 Bom. 54.

And generally, under Hindu Law, succession to a joint family estate goes by survivorship: and therefore, as between united sons and a separated grandson, the sons take by preference over the grandson. *Fakirappa v. Yellappa*, 22 Bom. 101. If he is undivided from them, his property passes to the whole of his male issue, which term includes his legitimate sons, grandsons and great grandsons. All these take at once as a single heir, either directly or by representation.

**Adopted son,** is entitled a one-fourth of the estate of the adoptive father if a natural son is born afterwards. *Rukhab v. Chunilal*, 16 Bom. 347: but in *Giriapa v. Ningapa*, 17 Bom. 100 only a fifth share was allowed. Except where he co-exists with a natural born son, an adopted son is entitled to same rights as a son born in all cases *e.g.* in collateral succession. *Dinonath Mookerjee v. Gopal Chunder*, 8 C.L.R. 57 or in remote lineal successions. *Mokundo Lal v. Bykunt Nath*, 6 Cal. 289.

**Primogeniture:**—The right of primogeniture by which the eldest male heir, lineal or collateral succeeds, is not recognized by Hindu Law except by custom in cases of impartible estates such as Zemindarees, Saranjams &c. It may exist by family custom, although the estate may not be a raj or a polliam. *Syamanda Das Mohapatra v. Ramakanta Das*, 32 Cal. 6.

The eldest son is the son who was first born, and not the first born son of a senior or even of the first married wife. It is by the birth of his first-born son that a Hindu discharges the duty which he owes to his ancestors. *Jagadeesh v. Shivpratap*, 3 Bom. L.R. 298. In Madras it was held that the later born son of a wife of a higher class,

though of the same caste, than that of a wife of a lower class, was preferentially entitled to succeed. *Sundaralingasami v. Ramasami Kamayya*, 22 Mad. 575: 26 I.A. 55. And the whole blood is entitled to preference over the half-blood. *Bhujang Rao v. Maloji Rao*, 5 Bom. H.C.R. 161. For determining who is to be the heir of an impartible estate, the same rules apply which govern succession to partible property, though the estate can be held only by one member of the family at a time. *Joyendra v. Nityananda*, 18 Cal. 151.

**Rules as to their succession.**

"(1) When an estate descends to a single heir, the presumption is that it will be held by the eldest of those who would hold it jointly, if the estate were partible.

(2) In cases not governed by the *Mitakshara* law of survivorship, the heir will be the eldest member of those persons who are nearer of kin to the last owner than any other class, and who are equally near to him as between themselves.

(3) Special evidence is required to establish a descent by primogeniture.

(4) The presumption as to primogeniture may be rebutted by showing a usage of choosing an heir on some other ground of preference." Mayne.

Note the following **two cases.**

(1) The **Shivganga case** decided that where an impartible Zemindari was joint property, the heir to it must be sought from among the male coparcenery : *i.e.* no female nor separated members could succeed.

(2) According to the **Tipperah case,** the person to succeed was the one who was nearest to the last male holder at the time of his death and that the principles of survivorship could not be applied so as to give the succession to a person who was not the nearest heir.

**Illegitimate sons:** Such sons in the three higher classes never take as heir, but are only entitled to maintenance. The illegitimate son of a Sudra may inherit jointly or solely according to the following text.

जातोऽपि दास्यां शूद्रेण कामतोंऽशहरो भवेत् । मृते पितरि कुर्युस्तं भ्रातरस्त्वर्धभागिकं ॥
अभ्रातृको हरेत्सर्वं दुहितॄणां सुतादृते ॥

["Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share : and one who has no brothers may inherit the whole property in default of daughter's sons"]. Yajn : II. 133, 134.

**Dâsi, Dâsiputra.** There is a great difference of opinion between the High Courts about the meaning of the words *Dâsi* and *Dâsiputra.*

In Bengal it has been interpreted literally as meaning "a female slave." *Narain v. Rakhal*, 1 Cal. 1: *Kripal v. Sukurmoni*, 19 Cal. 91. *Ram Sarun v. Tekchand*, 28 Cal. 194.

In Bombay it has been held that the word *dasi* does not necessarily mean anything more than an unmarried Sudra woman kept as a concubine. The connection must be continuous and lawful. Hence, the son born of an absolutely prohibited union, such as an incestuous adulterous connection could not inherit even to a Sudra. There must have been an established concubinage. *Rahi v. Govind*, 1 Bom. 110: *Sadu v. Baiza*, 4 Bom. 37, 44.

The same interpretation has been put by the Madras High Court, and accepted at Allahabad. *Pandiya v. Puli*, 1 Mad. H. C. 478. (*Subnomine*) *Inderun v. Ramasawmy*, 13 M.I.A. 141 (**P.C.**): *Krishnayan v. Muthusami*, 7 Mad. 407: *Brindavana v. Radhamani*, 12 Mad. 86. *Harigobind v. Dharam Singh*, 6 All. 329. The woman must be a Hindu. A kept woman of any other faith would not be a *dasi* nor her son a *dasiputra.* *Vangalu Dikshatalu v. Gavaramma* 27 Mad. 13.

**Share of an illegitimate son:** Vijnaneshwara, commenting upon the text of Yajnavalkya remarks as follows:—"The *dasiputra* obtains a share by the father's choice or at his pleasure. But after the father's death, if there be sons of a wedded wife, let these allow the *dasiputra* to participate a half; *i.e.* in the ratio of 2:1; and in the absence of legitimate sons and sons and grandsons of a daughter, he would take the whole." See also *Fakirappa v. Fakirappa*, 4 Bom. L.R. 809. According to the *Duttaka-Chandrikâ* "if any heir, *e.g.* a daughter's son exist, the *dasiputra* does not take the whole estate, but on the contrary, shares equally with such heir." But according to

West and Buhler, he would inherit the whole estate, even though a widow of the latter might be living. This has been followed by the Bombay High Court in *Rahi v. Govinda*, (ubi Supra), where it has been held that a *dasiputra* will also share the property with a daughter and a son while there is a widow, subject to a charge of her maintenance. And the case has been followed in *Sadu v. Baiza*, 4 Bom. 37.

[ Facts: Baiza = Manaji = Savitri.

Mahadev (Legitimate son). | Daryabai (daughter). | Sadu (Illegitimate son).

Manaji died, leaving two widows, a legitimate son (Mahadev) and a daughter, and an illegitimate son (Sadu).]

It was held that Mahadev and Sadu took the whole estate subject to the maintenance of the widows and marriage charge of the daughter, and that on Mahadev's death, Sadu would take the whole by survivorship.

The result of these two cases would be that wherever there was an illegitimate son, the widow would be entitled to no more than a maintenance, and that the daughters and their sons could inherit at the exclusion of the widow. This would be in direct contravention of the general rules of inheritance. The Madras High Court appears to have taken a more favourable view of the widows' rights. (*Parvati v. Thirumalai*, 12 Mad. 354.) The courts in Bombay have evinced the same tendency *Sheshagiri v. Giriowa* 14 Bom. 785) and the soundness of the decision in I. L. R. 1 Bom. 97 has been expressly doubted in *Ambabai v. Govind*, 23 Bom. 265.

In Khandeish, a legitimate daughter and an illegitimate son take together.

An illegitimate son can only take the father's estate. He can never claim to inherit to collaterals. *Somi Shankar v. Rajeshwar*, 21 All. 99.

The Madras High Court has held that they have no claim by survivorship against the undivided co-parceners of the father and therefore cannot sue his father's collaterals for partition after his death. *Ranoji v. Kandoji*, 8 Mad. 557; unless it was the wish of the father that they should so participate. *Karupannan Chetti v. Bulokam Chetti*, 23 Mad. 16.

The illegitimate son of a married woman by a gosavi with whom she was living in adultery, while undivorced from her lawful husband, cannot inherit his father's property. *Narain Bharathi v. Laving.* 2 Bom. 140.

When there is a widow and an illegitimate son, half of the estate goes to the widow, and the other half to the illegitimate son. "Until the line which terminates with a daughter's son is exhausted, the illegitimate son cannot take the whole estate, but is entitled only to a part of it.—so that, being illegitimate, he takes only a half, the other half going to the widow, daughter or daughter's son respectively. It follows therefore, that, if the widow takes, she takes as one of a line of persons who exclude the illegitimate son's right to more than the half."

2. **Widow.** In default of male issue, the next heir is the widow. Where there are several widows all inherit together. All take together as a single heir with survivorship and no part of the property passes to any more distant relation until all are dead. Where the property is impartible *e.g.* a Raj etc. it can only be held by one, and the senior widow is entitled, subject to the right of maintenance of the juniors.

Where several widows hold jointly, or one as manager for others, each has a right to her proportionate share of the produce of the property, and of the benefits derivable from its enjoyment, and may be placed in possession of separate portions, if that is the only effective mode of securing to each the full enjoyment of her right. But no partition can be effected between them, whether by consent or by adverse decree, so as to convert the joint estate into an estate in severalty and put an end to the right of survivorship.

**Want of chastity.**

An unchaste widow cannot inherit the estate of her deceased husband. But subsequent unchastity will not divert an estate once vested. *Sangawa v. Ranganganda* P. J. for '81, P. 245. *Parvati v. Bhiku* 4 Bom. H. C. R. 45. It is sufficient that such right had vested in her before her misconduct, and it is not necessary that she should have acquired possession of the estate before the misconduct. *Bharani v. Mahtap Kuar*, 2 All. 171.

A widow forfeits her right of inheritance by remarriage. *Russul Jahan v. Ram Saran* 22 Cal. 589.

Under S. 2 of Act XV of 1856 (The Widow Remarriage Act), makes the remarriage of a Hindu widow equivalent to her death for the purpose of divesting her of the estate derived by her by inheritance from her husband. *In Re-Omkar Narayan*, 83 P.J. 280.

**Effect of Re-marriage.**

A Hindu widow belonging to a caste in which remarriage has been always allowed forfeits upon such re-marriage her interest in property which has come to her as heir to her son in favour of the next heirs of the son. *Vithu v. Govinda*, 22 Bom. 321 (**F.B.**) Similarly in Madras *Murugayi v. Veeramakali*, 1 Mad. 226. But not in Allahabad See. *Har Saran Das v. Nandi*, 11 All. 330.

**Under this Act,** she loses all her existing rights in her late husband's property. She, however, does not lose any future interest in the family of her late husband. Thus she can succeed as heir to the estate of her son by first marriage, who died after her second marriage. *Akora v. Boriani*, 2 Beng. L. R. 199 *Basappa v. Rayava*, 6 Bom. L.R. 779 29 Bom. 91 (**F.B.**). By remarriage, she forfeits the interest taken by her in the estate of her first husband, whether at the time of her second marriage she is a Hindu or a convert to some other religion. *Matangini Gupta v. Ram Ratan*, 19 Cal. 289.

3. **Daughters:** Next in order after the widow come the daughters. Several daughters of the same class take equally the estate of their father; they take jointly in the same manner as widows with survivorship except in Bombay, where, according to the *Mayukha*, daughters take absolute and several estates in the property inherited from their father. In the absence of issue they may dispose of the same during their life either by gift or by will. There is neither a joint-holding nor survivorship in their case. *Balakhidas v. Kesharlal*. 6 Bom. 85; *Haribhat v. Damodarbhat*. 3 Bom. 171; *Bhagirthibai v. Kanhuji Rao*, 11 Bom. 285.

**Exclusion.**

A daughter will be excluded from inheritance by incurable disease or blindness or other disqualifying disability which exclude males from inheritance. *Bakubai v. Manchabai*, 2 B.H.C.R. 5. As to unchastity, except in Bengal, she is not deprived of her right of inheritance by incontinence on her part. *Adwayappa v. Rudrawa*, 4 Bom. 106; *Ganga Jati v. Ghasita*, 1 All. 46, and very recently in *Angamal v. Venkat Reddy*, 26 Mad. 509, the Madras High Court has held that the degradation of a daughter on account of incontinence des not put an end to her right to inherit the stridhan property of her mother, and it has also been observed there that the same rule would apply to the property of her father.

**Her place**: She comes in immediately after the widow, and was allowed preference over the widow of the subsequently adopted son of her predeceased brother's son. *Sitaram v. Chintaman*, 24 All. 492.

**Order of priority**: The unmarried come first, next come the married but unendowed and then the married and endowed. In Bombay, comparative poverty is the only criterion for settling the claim of daughters to the father's property. *Bakubai v. Manchabai*, 2 B.H.C.R. 5 and although the court cannot go minutely into this question of comparative poverty, still, where the difference in wealth is marked, the whole property passes to the poorest daughters. *Totawa v. Basawa*, 23 Bom. 229.

**Kind of Estate taken.** Except in Bombay, the estate taken by a daughter even under the *Mitakshara* is limited. *Venkayyamma v. Venkataramanayyamma*, 25 Mad. 678 (**P.C.**). In Bombay her right over the estate is absolute and unlimited. *Pranjiwandas v. Devakuar*, 1 Bom. H.C.R. 130; *Bhagirthibai v. Kanhuji Rao*, 11 Bom. 283; and on her death, it passes as *Stridhan* to her own heirs *i.e.* to her daughter, to the exclusion of her sons. *Jankibai v. Sundra*, 14 Bom. 612. But in Gujerath, Island of Bombay, and northern Kankan, where the *Mayukha* holds paramount authority, property inherited by her from the father, would go as a non-technical *Stridhan*. See cases beginning with *Vijayarangam v. Luxman*, 8 Bom. H.C.R. 244; and ending with *Mani Lal v. Bai Rewa*, 17 Bom.

4. **Daughter's son** : Except in Bombay, he succeeds after all the daughters. The daughter's sons take *per Capita* and are full owners.

**Bombay Law** : A daughter's son succeeds to her estate as her heir and not as the heir of the father. Therefore he succeeds on the death of his mother, even when there are other daughters of the mother's father living at the time. *Bhagirthibai v. Kanhuji rao* 11 Bom. 285.

According to the *Mayukha*, the daughter's sons take *per sterpes*. Among Sudras, illegitimate sons take half shares with daughters and daughter's sons. *Sadu v. Baiza* 4 Bom. 52.

Their Lordship of the judicial committee, in an appeal from Madras, have held that on the death of the daughter, her sons succeed to the property as heirs of the grandfather, and take it as ancestral

property jointly with the right of surviorship. It was also held there that the doctrine of survivorship was not limited to unobstructed succession and to the succession to the joint property of re-united coparceners. *Venkayyamma Garu v. Venkatramanayyamma Bahadur* 25 Mad. 678 (**P.C.**)

5. **Parents**: According to the *Mitakshara*, the mother takes before the father *e.g.* in Ratnigiri. *Balkrishna v. Luxman* 14 Bom. 605. The *Mayukha* is directly opposed to the *Mitakshara* and prefers the father to the mother. *Khodabai v. Bahadur* 6 Bom. 541.

*N. B.* A *step-mother* is not included in the word mother, nor a step-grandmother in the word grand-mother *Ramasami v. Narasamma* 8 Mad. 133. In Bombay, she may inherit as the widow of a gotraja-Sapinda, but not as a mother. *Rakhma Bai v. Tuka Ram* 11 Bom. 47.

Her place in the line of heirs is not yet determined. *Kesarbai v. Bai Wallub* 4 Bom. 188; she does not succeed in preference to (1) the grand-father's brother's grandson. *Ramasami v. Narasamma* 8 Mad. 133; (2) the paternal grand-mother *Muttammal v. Venga Lakshmiammal* 5 Mad. 327. (3) the step-son's paternal uncle's son *Russabai v. Yulekabai* 19 Bom. 707 or (4) a paternal uncle *Mari v. Chinnammal* 8 Mad. 107; nor (5) in preference to a Sapinda of the deceased. *Kumara Velu v. Virana Goundan* 5 Mad. 29.

**Unchastity.**

In Bombay and Madras, Chastity is not a condition precedent to the vesting of an estate in the mother and it does not at all affect her position. *Adrayappa v. Rudrappa* 4 Bom. 104; *Kojiyadu v. Lakshmi* 5 Mad. 149; subsequent unchastity does not divest an estate already vested. *Mt. Deoki v. Sookdeo* 2 N.W.P. 361; but see contra *Ram Nath Jalapat rao v. Durga Sundari Devi* 4 Cal. 550.

The estate taken by the mother is a life estate and on her death, the son's heirs succeed to the property. *Narasappa v. Sakharam* 6 Bom. H.C.R. 215: *Sadashiv v. Sitabai* 3 Bom. 353.

6. **Brothers**: Among brothers, those of the whole blood succeed before those of the half-blood. If there are no brothers of the whole blood, then those of the half-blood are entitled according to the *Mitakshara*. The Mayukha, however, prefers nephews of the whole to brothers of the half-blood, and its authority is paramount in Guzerat and the Island of Bombay. *Krishnaji v. Pandurang* 12 Bom. H.C.R. 65.

*N. B.* "The preference of the whole-blood over the half-blood is restricted to the case of brothers and sons of brothers only, as far as the *Mitakshara* and the *Mayukha* are concerned. Further, *Mayukha* expressly contradicts the *Mitakshara* position of full and half-brothers coming after one another. The half-brother comes in only after brother, brother's son, grand-mother and sister as a *Gotraja Sapinda* along with the grand-father" per Ranade J in *Vithalrao v, Ramrao* 24 Bom. 317 at P. 338.

It has been held in an appeal from Calcutta, that a brother includes a half-brother. *Thakurain Balarj Kunwar v. Rae Jagatpal singh* 31 I. A. 132

Illegitimate brothers may succeed to each other.

Where no preference exists on the ground of blood, an undivided brother always takes to the exclusion of a divided brother.

7. **Nephews:** In default of brothers (whole or half) the sons of brothers succeed.

A brother's son succeeds as heir in preference to a sister or a grand-daughter. *Mulji v. Karsandas*, 24 Bom. 583.

According to *Mayukha*, the sons of a brother who is dead, are allowed to share along with brothers. But this rule does not go beyond brothers and brothers' children. See *Chandika Baksh v. Muna Kuar*, 24 All. 273. (**P.C.**).

**Rule as to their Succession.**

The same rules apply to the order of precedence between sons of whole or half brother, or between divided and undivided nephews as in the case of brothers. If a brother's sons claim by right of representation, they take PER STERPES along with their uncles. But when succession devolves on brother's sons alone as nephews, they take PER CAPITA as daughter's sons do. A nephew has not a vested interest.

8. **Grand-nephew:** In Bengal, grand-nephews are next heirs after the brother's sons. The *Mitakshara* does not expressly mention them. But in Western India the grand-nephew has been allowed to be an heir, but his position is not exactly defined. Recently, the Bombay High Court has allowed him preference over the widows of a daughter's son. *Vallabhdas v. Sakwarbai*, 25 Bom. 281. And in Allahabad, over the son of a paternal uncle. *Kalian Rai v. Ram Chandar*, 24 All. 128, dissenting from *Suraya v. Lakshminarasimma*, 5 Mad. 291, where it was held that the expression "sons" does not include a grandson,and that the son of the paternal uncle succeeds before a brother's grandson.

9—14. **The line of grandfather, great-grandfather &c.** After the line of the father is exhausted to the grand nephew, the members in the grandfather's line, headed either by the grand-father or grand-mother succeed in order, the nearer in degree excluding the one who is more remote. Then the line of the great grandfather and so on, so that the following enumeration will show the way in which succession in this line is determined. There is no preference of whole over half-blood (priority on this ground being limited to brothers and their issue) See 24 Bom. 317.

9. **Grand parents,** (male or female having precedence, according as the case is governed by the *Mitakshara* or *Mayukha.)*

10. **Paternal uncle,** his son, and grandson.

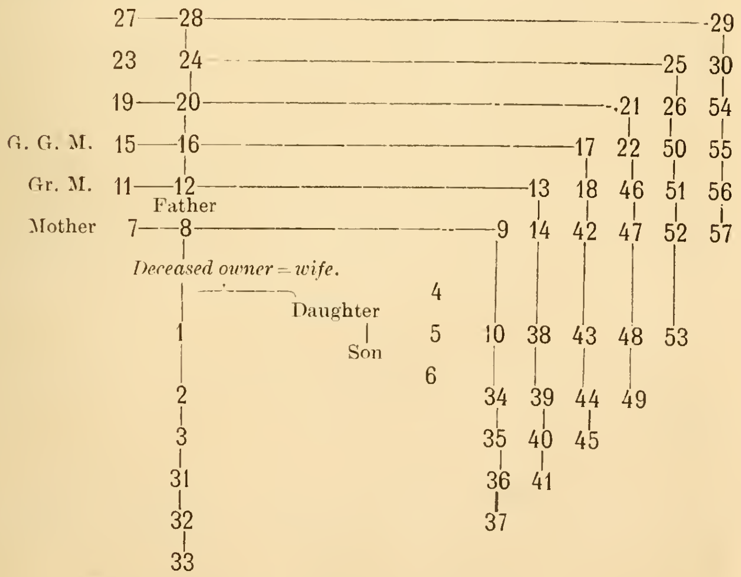
11. **Great grand parents.**

12. **Grand-uncle, his son, and grandson.**

13. **Sakulyas.**

14. **Samanodakas.**

The accompanying table prepared by Mr. Mandlik will show the line of remoter *Sapindas* of the same gotra:—




(Cited Bhattacharya's Hindu Law Page. 449).

In the presidency and Island of Bombay, a wife becomes by her marriage a *Sagotra Sapinda* of her husband and in that capacity succeeds as a widow to property which he would have taken as a *Sapinda* before the male representative of a remoter branch. Thus the widow of a first cousin *exparte paterna* was held to have priority over a fifth male cousin *exparte paterna* of the same. *Lallubhai v. Mankuarbai*, 2 Bom. 388: *Lallubai v. Kasibai*, 5 Bom. 40.

A Hindu widow died leaving her surviving an undivided daughter-in-law and the paternal uncle's son of her deceased husband. The daughter-in-law was held entitled to succeed to the property, in priority to the paternal first cousin of her deceased husband. *Vithaldas v. Jesubai*, 4 Bom. 219.

The members of the compact series of heirs specifically enumerated take in the order in which they are enumerated preferably to those lower in the list, and to the widows of any relatives whether near or remote, though when the group of specific heirs is exhausted the right of the widow is recognized to take her husband's place in competition with the representative of a remoter line. *Nahalchand v. Hemchand*, 9 Bom. 31. *Lallubhai v. Mankorbai*, 2 Bom. 388.

The sons of a paternal uncle inherit in preference to the widow of another paternal uncle. The females in each line of *gotrajas* are excluded by any males existing in that line within the limits to which *gotraja* relationship extends. Where the contest lies between a female *gotraja* representing a nearer line and a male *gotraja* representing a remoter line of *gotraja-sapindas* the former inherits by preference over the latter. But the result is different when the female and the male *gotrajas* belong to the line of the same ancestor of the propositus. The preponderance of reason is in favour of holding that the females in each line of *gotrajas* are excluded by any male existing in that line within the limits to which *gotraja* relationship extends. *Vithaldas v. Jesubhai*, 4 Bom, 290; *Rachawa v. Kalingappa*, 16 Bom. 716. Cf also *Venilal v. Parjaram*, 20 Bom. 73.

The daughter of a predeceased son is not entitled to inherit in preference to the great-grandson in the male line of a separated brother.

9 A. The **Sister**: The sister has no religious efficacy whatever, as she is in no way connected with the funeral offerings to her brother. She is a Sapinda as regards affinity; but she is not a *gotraja-sapinda* according to the Benares writers, as she passes into a strange

*gotra* immediately after her marriage. **In Bombay** alone she has a clearly recognised position, and her right is beyond dispute there. *Lallubhai v. Mankuarbai* 2 Bom. 445. According to Westropp C. J. her right rests upon her affinity as *Sapinda*, even though not a *gotraja*. and upon the express authority of *Brihaspati* and *Nilakantha*. *Vinayak v. Luxmibai* 1 Bom. H.C.R. *Sakharam v. Shitabai* 3 Bom. 353. Half-sisters succeed as well as sisters of the whole blood, though they come in after whole sisters.

**Her place** among the *gotraja-Sapindas* is between the paternal grandmother and the paternal grandfather. *Sakharam v. Sitabai* 3 Bom. 353: *Dhondu v. Gangabai* 3 Bom. 369.

A full sister has preference over the step-brother or paternal first-cousin. *Luxmi v. Dada Ravji* 4 Bom. 210: *Rudrappa v. Irawa* 5 Bom. L.R. 676 (a case from Dharwar, a brother's widow) 28 Bom. 82.

A sister and half-sister inherit in priority to the step-mother as well as to brother's wife and paternal uncle's widow. *Kesarbai v. Wallabh* 4 Bom. 188. They take equally *inter se* without any preference of the unendowed over the endowed as among daughters. *Bhagirthibai v. Baya* 5 Bom. 264. They take separately and not as joint-tenants. *Rindabai v. Anacharya* 15 Bom. 206. Half-sisters, however, come in after or in default of full sisters. *Kesarbai v. Bai Willubh* 4 Bom. 188.

**How they take.**

In **Bengal** and **Benares** a sister has no right to inherit. In Madras, her right has been recently recognised. *Kutti Ammal v. Radha Krishna* 8 Mad. H.C.R. 88: *Luxumanammal v. Tiruvengada Muduli* 5 Mad. 241.

**Bandhus** or **cognates**, are *Sapindas* of different gotras. According to *Vijnaneshwara*, all those who are descended from a common ancestor, and are within seven or five degrees are Sapindas This term includes *gotraja-sapindas* as well as *Bhinnagotra sapindas*. Gotraja sapindas are agnates or those descended from a common male ancestor and connected with the deceased through males. The *Bhinna-gotra sapindas* are those who are connected through a female ancestor[1]. These

1. The reader may, with advantage, compare the *agnati* and *cognati* of Roman Law.

are called *Bandhus* or cognates. Vijnaneshwar divides them into three classes (1) *Atma-bandhus* or those related to the person himself

(2) *Pitri-bandhus* ... ... ... to his father, and

(3) *Matri-bandhus* ... ... ... mother.

The sons of his own fathers's sister, the sons of his own mother's sister, and the sons of his own maternal uncle are considered as his own cognate kindred (*Atma-bandhus*) and similarly, the sons of his father's paternal aunt, maternal aunt and maternal uncle respectively are his father's cognate kindred (*Pitri-bandhus*) and so on for the mother's cognates or *Matri-bandhus*. Of the three classes and their sub-classes, the *Atma-bandhus* succeed first, then the *Pitri-bandhus*, and then the *Matri-bandhus* [2], and there is no difference in this respect in the rules laid down by the *Mayukha* and the *Mitakshara*. *Parot Bapa Lal v. Mehta Hari Lal*, 19 Bom. 681. The statement of *bandhus* given above is not exhaustive, it is merely illustrative. *Gridhari Lal v. Government of Bengal*, 2 P.C.R. 160; *Muthuswami v. Simambedu*, 19 Mad. 405.

Accordingly, a maternal uncle is an heir though not specified in the list: and he also has priority over the sons and grandsons of the paternal aunt of the father of the deceased, who are more remote than himself. And a half-brother of the mother stands upon the same footing as against remoter *bandhus*, though he cannot succeed when he co-exists with a full maternal uncle. 19 Mad. 405 *(supra)*. (The table appended at the end of this chapter, taken entirely from Mr. Mayne's Hindu Law, will give a tolerably sufficient list of *bandhus*. The student will do well to master it as thoroughly as he can.)

**Cases:** Maternal uncles succeed in priority to mother's sister's sons. *Mohandas v. Krishnabai*, 5 Bom. 597; but not to a father's half-sister, who has priority over a mother's brother. *Saguna v. Sadashiv*, 26 Bom. 710. The grandson of the paternal great-grandfather has priority over a paternal aunt. *Ganesh Waman v. Waghu Rajaram*, 27 Bom. 611.

**Cognates recognized by courts:**

(1) Sister's son *Umed Bahadoor v. Udachand*, 6 Cal. 119; *Sagunabai v. Sadashiv*, 26 Bom. 710,

(2) Sister's daughter's son 6 Cal. 119 *(supra.)*

(3) Daughter's son's son. *Krishnaya v. Pichama*, 11 Mad. 287.

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2. तत्र च अन्तरङ्गत्वात्प्रथममात्मबन्धवो धनभाजस्तदभावे पितृबन्धवस्तदभावे मातृबन्धव इति क्रमो वेदितव्यः

(4) Paternal great aunt's grandson. *Sethurama v. Ponnammal*, 12 Mad. 155.

(5) Mother's maternal uncle's grandson. *Ratna Subba Chetti v. Ponappa*, 5 Mad. 69.

(6) Brother's daughter's son. *Mr. Durga Bibee v. Janki Pershad*, 18 W.R. 331.

(7) Maternal grandfather. *Chinnammal v. Venkata*, 15 Mad. 421.

**Mitakshara and Dayabhaga.**

**Note: I.** As has already been seen above (P. 14) the principal point of difference between the *Dâyabhaga* and the *Mitakshara* is that under the former, religious efficacy is the text for determining an heir's title; while under the latter, propinquity, and not religious benefit, is the test. The *Mitakshara* refers to the distinction between *sapindas* and *Samanodakas* not as evidencing different degrees of religious merit, but as marking different degrees of propinquity. (प्रत्यासत्तिः) Now, propinquity may be understood (1) as being either propinquity by descent in line or degree through common male ancestor, or (2) propinquity may be by descent through common mother, (3) propinquity may also be by identity of caste, or (4) it may be by spiritual benefit. Vijnaneshwara did not understand propinquity in the same sense in all these cases; *e.g.* where preference is given to the mother over the father, the propinquity is obviously of a different kind from what obtains in the case of full and half brothers born of different mothers.* per Ranade J. in *Vithal Rao v. Ram Rao*, 24 Bom. 317/334, 335.

**II.** Under the *Daya Bhaga* as under the *Mayukha*, the father takes first and then the mother; while the *Mitakshara* gives preference to the mother over the father.

**III.** Both take the very same text as a base for their order of succession, but both diverge considerably from each other, on account of the definitions of *Sapinda* given by each.

The *Sapinda* according to the *Mitakshara* is either *sagotra* (agnates) or *Bhinnagotra* (cognates). The agnate *Sapindas* come first, then the agnate *Samanodakas* and then the cognate *Sapindas* or *bandhus* (See page).

The *Sapinda* under the *Daya bhaga* covers three generations in ascent and descent on the paternal and maternal side. The cognate *Sapindas* are further divided into *Gotraja Sapindas* and *non-Gotraja Sapindas*—the daughter's sons of agnates being included in the class gotraja-sapinda, while the *sapindas* of the maternal grandfather's family being included among the *non-Gotraja Sapindas*.

NOTE: Under the *Mitakshara* excepting the daughter's son of the deceased himself, the daughter's sons of all other male agnates are classed as *bandhus* or cognates and are post-poned till the line of agnates is exhausted.

**IV.** According to the *Dâya-Bhâga*, *Bandhus* come before the *Sakulyas* and *Samanodakas*, while under the *Mitakshara* no cognate can take while there is a single agnate alive, however distant.

As regards succession among *bandhus (inter se)* the two systems differ widely. According to the *Dâya-Bhaga*, *bandhus* can only be in the maternal grandfather's line As for the *Mitakshara*. See page. 171

# Order of succession according to The Daya Bhaga.

[For an excellent sketch of this, the reader is referred to the Nirnaya-Sâgara edition of the *Mitakshara*, page 205 foot-note].

V. 1. The *Issue*—*i.e.* son, grandson and great grandson, all taking together either directly, or by representation *per stirpes* (मृतपितृकपौत्रमृतपितृपितामहकप्रपौत्रयोस्तु पुत्रेण सह युगपदधिकारः)

2. Widow—"With the assets of the husband, she should enjoy them in the house of the husband, or in its absence, in the house of the father. She may spend over such charities for the (spiritual) benefit of (the) husband, but not absolutely like (her) stridhan".

3. Daughter—among daughters, (*a*) the unmarried comes first, then (*b*) the betrothed, and (*c*) the married. Of the married daughters, those who have, or are likely to have, sons take. Barren, widowed or sonless ones have no claim.

4. Daughter's sons take in the absence of capable daughters.

*N. B.* The daughter's sons of the sons and grandsons of the deceased are all entitled to inherit as Gotraja Sapindas of a nearer line and exclude the remote ancestors and their descendants.

5. Parents, the father coming in before the mother.

A mother guilty of unchastity, is excluded from inheritance under the Bengal Law. *Râm Nâth v. Durga Sundari* 4 Cal. 550.

6. Brothers—Of the brothers, first come those of the whole blood (full brothers), then those of the half-blood. In the case of re-union, see page.

7. Brother's sons take in the same order as brothers, according as they are related in the whole or half blood to the deceased.

8. Brother's grandsons take similarly.

9. Daughters sons of the father. These take equally and not according to their mothers, sons of sisters of the whole and half-blood taking all equally. *Bholanath Roy v. Rakhal Das* 11 Cal. 69. Then come the following in order:

10. Grandfather's line:—grandfather, grandmother, their sons, grandsons etc. in the same order.

11. Great-grandfather, great-grandmother, their sons, grandsons etc.

12. Maternal grandfather, his sons, grandsons etc.

13. ,, great-grandfather, his sons, grandsons etc.

14. ,, great-great-grandfather, his sons, grandsons etc.

15. ,, Sakulyas in the following order :

(*a*) Sakulyas in the descending line *i.e.* the son, grandson, and great-grandson of the great-grandson of the *propositus* and of his three immediate paternal ancestors.

(*b*) Paternal ancestors of the great-grandfather and their Sapinda descendants.

(*c*) The remote descendants of the three remote paternal ancestors.

16. Samanodakas.

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## Ulterior Heirs.

On failure of *Bandhus*, the property would be taken by the Preceptor, the pupil, the fellow-student, or a learned and venerable priest, or any Brahmin. * In the case of a brahmin, the king should never take his wealth by escheat. (न कदाचिदपि ब्राह्मणद्रव्यं राजा गृह्णीयात् । ९. मनुः ९. । १८९.) But this law has been considerably modified by the decision in *Collector of Masulipatam v. Cavaly Venkata*, 1 P.C.R. 417, where their Lordships of the Privy Council have held, after citing the whole passage from the Mitakshara, that on the death of a Brahmin without heirs, his estate may be taken by the king, though the king would, in such a case, be under an obligation to give the same according to the direction of the Shastras."

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* बन्धूनामभावे आचार्यः । तदभावे शिष्यः । + + शिष्याभावे सब्रह्मचारी । + + तदभावे ब्राह्मणद्रव्यं यः कश्चित् श्रोत्रियो गृह्णीयात् । तदभावे ब्राह्मणमात्रम् ।९. मिताक्षरा.

When the crown takes by escheat, it must make out that there are no heirs, and the burden of establishing it lies upon it. *Girdhari Lall Roy v. Bengal Government*, 12 M.I.A. 448/454. *The Secretary of state v. Haribat Rao Hari*, 28 Bom. 276/283.

Its title prevails against all unauthorized alienations *e.g.* by a widow, but is subject to any trust or charge properly created. And where a sum of money was claimed from Government as due under a *Kadim Hak* and Government pleaded escheat, it was held that, to establish a title by virtue of an escheat, in such a case, it must be established (1) That there was a heritable grant to individuals, (2) that the heirs of those individuals have failed, and (3) that, on the happening of these conditions the haks would escheat to the Government. *The Secretary of state v. Haribatrao* 28 Bom. 276: 6 Bom. L.R. 43.

Escheat is, moreover, only to the crown, and does not apply to Zemindars who have carved out subordinate but absolute and alienable interest from their own estate. *Sonet v. Mirza*, 3 I.A. 92.

## Special Rules of Succession in Special Cases.

### 1 Hermits &c.

वानप्रस्थयतिब्रह्मचारिणां रिक्थभागिनः ।
क्रमेणाचार्यसच्छिष्यधर्मभ्रात्रैकतीर्थिनः ॥ याज्ञवल्क्यः ॥२. १३७. ॥

[The heirs] who take the wealth of a *Vânaprastha* (a hermit), of a *Yati* (an ascetic), and a *Brahmacharin* (a student), are in their order, the preceptor, the virtuous pupil, and one who is a supposed brother and belonging to the same order".

No one can come under the above heads, unless he has absolutely renounced all earthly interests, and in fact become dead to the whole world. In such a case, all property then vested in him passes to his legal heirs, who succeed to it at once. If his retirement is of a less complete character, the mere fact that he has assumed a religious title and has even entered into a monastery, will not divest him of his property, or prevent his secular heir from succeeding to any secular property which may have remained in his possession. *Khaggender v. Sharupgir* 4 Cal. 543.

A *Sudra* cannot be a *Sanyasi* (ascetic); and the devolution of property left by such a person becoming an ascetic is regulated by the ordinary law of inheritance, in the absence of proof of usage to the contrary. *Dharmapuram Pandara Sannadhi v. Virapandiam Pillai* 22 Mad. 302.

Where an ascetic leaves a large property, or property which he could not have acquired at all, if he conformed to the spirit of his religion (*e. g.* a tenant-right of occupancy), it may be a question whether the succession takes place according to the general law or according to the special law laid down above. *Sooraj Koomar v. Mahader Dutt*, 5 N. W. P. 50.

The **principle of succession** in these cases is based upon fellowship and personal association, and a stranger, though of the same order, is excluded [1]. *Khaggendar v. Sharupgir* 4 Cal. 543.

And a disciple who leaves his spiritual master without permission, and goes to a distant country and breaks off all intercourse with his preceptor, manifesting at the same time an intention to absent himself permanently, is not entitled to any share. *Soogun Chund v. Gopalgir* 4 N. W. 101.

Generally, a Chella has no right as such to succeed to the property of his deceased guru, unless he has been nominated by the deceased during his life-time. The nomination is generally confirmed by the Mohunts of the neighbourhood assembled together for the funeral obsequies of the deceased. *Madho v. Kamta*, 1 All. 539. *Trimbak Puri v. Gangabai* 11 Bom. 574.

In the absence of such a nomination, the successor is elected by the Mohunts and principal persons of the sect in the neighbourhood upon the occasion of the funeral obsequies of the deceased, *Nirunjun Barthee v. Padaruth B.* S.D.A. N.W.P. 1864 P. 512 followed in *Madho Das v. Kamta Das*, 1 All. 539.

In certain cases, a priest may be the heir of a deceased disciple *Jugdanund v. Kessub Nund*, W.R. 1864. P. 146.

In the absence of a Chela, the chela of a *Guru-bhand band* is an heir to the property of a deceased gosavi in preference to his widow *Gitabai v. Shirbakus*, 5 Bom. L. R. 318. (a case of *Garbhari Gosavis*).

**Mohunts:** Practically the same rules, as above, apply to the property belonging to a *Muth*. See the following cases: *Gosain Dowlat Gir v. Bissessur*, 19 W.R. 215. *Gendu Puri v. Chatur Puri*, 13 I. A. 100: 9 All. 1. *Ramdas Byragee v. Gungu Doss*, 3 Agra 295.

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1 "नन्वनंशास्त्वाश्रमान्तरगताः" इति वसिष्ठस्मरणादाश्रमान्तरगतानां रिक्थसंबन्ध एव नास्ति कुतस्तद्विभागः । मिताक्षरा. पृ. २०६.

A *Mohunt* being bound to lead the life of an ascetic, cannot have a son who can claim the Muth property after the Mohunt's death. *Mohunt Rumun Das v. M. Ashbul Das*, 1 W.R. 160: but a duly nominated near relative may succeed. *Sheoram Brahmachari v. Subosuk*, 3 Sel. Rep. 358, 477 (cited Bhattacharya H.L.)

If, however, a Mohunt has dealings with the world, and leaves property which he earns by trade or otherwise, such property may be inherited according to the ordinary Law. *Mohunt Madhu Ban v. Hari Krishna*, S.D.A. for 1852 P. 1089.

Generally, only one person can occupy the office of a Mohunt at a time. *Greedharee v. Nund Kishore*, 2 P.C.R. 86: unless a special custom exists. Among some sects of Bairaghis, all the Chellas inherit jointly. *Gopal Das v. Damodhar*, 1 Mor. Dig: 331.

As to **Gosavis** the same principles apply generally. Note also the following cases and authorities. *Trimbakpuri Guru Sitalpuri v. Gangabai*, 11 Bom. 514. *Balgir v. Dhondgir*, 5 Bom. L.R. 114: *Gitabai v. Shirbakas;* Ibid 318 (*garbhari gosavis*). West and Buhler's Hindu Law. Steel, Appendix: and Hindu Castes and sects by Dr. Bhattacharya (1896).

2. **Foreign Merchants.**

देशान्तरगते प्रेते द्रव्यं दायादबान्धवाः । ज्ञातयो वा हरेयुस्तदागतास्तैर्विना नृपः ॥

याज्ञवल्कीये २. २६४.

"When one dies (while gone) in (to) a foreign country, let his *dayadas* (viz. sons &c. as enumerated before), *bandhus*, or his caste-people or his companions take his wealth; and in their default, the king" Yajn: II 264.

3. **Impartible Estates:** In this case, succession to the estate is determined by the usage prevailing with reference to such estate. It may be that such a custom may give the management to the eldest son, or to a male or even to females. Each case will be determined by its own circumstances.

In Bombay, every female member of a **Watan** family other than the widow of the last holder and every person claiming through a female, is postponed, to every male member of the family qualified to inherit the Vatan, or part thereof or interest therein. S. 2 of Bombay Act V of 1886.

But this restriction does not continue if the land or emoluments cease to be *Vatan*.

**Saranjams** or assignments in lieu of services (generally military) are *prima facie* impartible. They may become partible by usage. Similarly with reference to the Inams, which, from the beginning may be partible.

4. **Succession to the member of a re-united family.**

Note the following text from Yajnavalkya. Book II.

संसृष्टिनस्तु संसृष्टी सोदरस्य तु सोदरः । दद्यादपहरेच्चांशं जातस्य च मृतस्य च ॥ १३८.
अन्योदर्यस्तु संसृष्टी नान्योदर्यो धनं हरेत् । असंसृष्ट्यपि वा दद्यात्संसृष्टो नान्यमातृजः ॥ १३९.

138 "A re-united co-heir [takes the wealth] of a re-united co-heir (and) a uterine brother [that] of a uterine brother. [The re-united brother] shall give up the wealth of the deceased to one born [of his body], or [failing one such] shall retain it."

139 "One born of a different mother, if re-united, may take the wealth; but one born of a different mother and not reunited [cannot take]; but a uterine brother, even if not reunited, should obtain the wealth, and one born of a different mother, even if re-united, shall not take alone."

**Rules of Succession Generally,** Where there has been a reunion between persons expressly enumerated in the text of Brihaspathi (See above) *viz.* father, brother and paternal uncle, and where their descendants continue to be members of the reunited Hindu family, the law of inheritance applicable to these is the same as in the case of the death of any of those between whom the reunion takes place. *Abhai Charan Jana v. Mongal Jana* 19 Cal. 634.

(1) If a reunited copareener dies leaving issue actually born or then in the womb such issue takes his share.

A partition had taken place between three brothers, A, B & C. A and B reunited. A died leaving two grandsons. On the death of B leaving a daughter, who married but subsequently died without male issue, the grandsons and the sole representative of C, who also had died, claimed to be entitled as one of the reversionary heirs of B to one third of his property, *Held*, that the daughter of B having married into another family, no presumption could be drawn from the reunion of A and B that the coparcenary continued as between the descendants of A and B up to the death of B's daughter. *Krodesh Sen v. Kamini Mohun Sen*, 10 C. L. R. 161.

(2) There can be no survivorship in reunion.

(3) A reunited brother of the whole or half blood excludes a separated brother of the same class.

(4) Reunited brothers of the half-blood and separated brothers of the whole take equally: and sons of deceased brothers take by representation. *Ramasami v. Venkatesam*, 16 Mad. 440.

(5) Where all the brothers are reunited, those of the half-blood are excluded by the uterine brothers. *Rajkishore v. Govind*, 1 Cal. 27.

(6) In default of brothers, the succession passes, (in order), to, the father or paternal uncle if reunited, the half-brother not reunited, the father not reunited. In default of any of them, then successively to the mother, the widow, and the sister. If none of these exist, then to the nearest *Sapindas* or *Samanodakas* as in the case of ordinary property.

## Exclusion from Inheritance.

क्लीबोऽथ पतितस्तज्जः पङ्गुरुन्मत्तको जडः ।
अन्धोऽचिकित्स्यरोगाद्या भर्तव्याः स्युर्निरंशकाः ॥ याज्ञवल्कीये २. १४०.

[An impotent person, an outcaste and his issue, one lame, a mad man, an idiot, a blind man, and (a person) afflicted with an incurable decease and others are (persons) not entitled to a share: and are to be maintained.] Yajn: II 101. See also Manu. IX 20; Nâradâ XIII 21.

Commenting upon this, *Vijnâneshwara* adds: "by the word *Adya* (others) is to be taken (to include) one who has entered another stage of life, is hostile to his father or is guilty of a minor offence or who is deaf, dumb or devoid of a limb.

( "आद्यशब्देनाश्रमान्तरगतपितृद्वेष्युपपातकिबधिरमूकनिरिन्द्रियाणां ग्रहणम्". )

From the passages above quoted and referred to, it is clear that persons suffering from any bodily or mental defect, or guilty of any social, moral, or religious misconduct, are incapacitated from taking under the law of inheritance. From the texts, the following list may be drawn of **persons disqualified to inherit.**

1. The **blind**: blindness in order to exclude, must be congenital *Murarji Gokuldas v. Parvatibai*, 1 Bom. 177: and a person will not be excluded simply because his blindness is incurable. *Umabai v. Bhavu Padmanji* 1 Bom. 557.

2. **Deafness** and **Dumbness** are other causes of exclusion: but these incapacities must be congenital in order to exclude a person.

A Hindu widow born dumb is, according to the law in western India, incapable of inheriting from her husband, though she is entitled to her *Stridhan* and maintenance out of her husband's property. *Vallabhram Shibnarayan v. Bai Hariganga* 4 Bom. H. C. A. C. J. 135.

3. A lame man is excluded according to the texts. If he is able to walk a little, he is not a *Pangu* पंगु and therefore he would not be excluded. Lameness, in order to work as an excluding cause, must be congenital. *Venkata Subba Rao v. Purushotam*, 26 Mad. 133: *Quaere*, whether lameness which is congenital would be a bar (*Ibid*).

4. An idiot or a mad man from birth, or one affected by any sort of insanity: Insanity, in order to exclude, need not be congenital, or even incurable, in order to exclude a party from inheritance. It is sufficient if he is affected by such incapacity at the time when the inheritance opens. In fact, that is the time which determines the rights of persons entitled to inherit. *Ram Sahye v. Lalla Laljee Sahye*, 8 Cal. 149; 9 C.L.R. 457; *Dwarkanath Bysok v. Mahendranath*, 9 B. L.R. 198; 18 W.R. 305. *Wooma Pershd Roy v. Grish Chunder*, 10 Cal. 639; *Deo Kishen v. Budh Prakash*, 5 All. 509; and a party who had obtained a decree declaratory of his right to succeed to certain property as reversioner on the death of the widows, and on their death he had become insane, it was *held* that he was not entitled to any advantage under the decree. *Broja Bhukan Lal v. Bichan Dobi*, 9 B.L.R. 204 (note) 14 W.R. 330 And insanity which would have been a bar to a claim as heir, would equally bar a suit as coparcener for partition. *Ram Soonder Roy v. Ram Sahye Bhugut*, 8 Cal. 919.

A person who has succeeded to the inheritance of property does not lose it by a subsequent insanity. *Abilakh Bhagat v. Bhekhi Mahto*, 22 Cal. 864; nor is a Hindu lunatic incapable of possessing property which is conveyed to him otherwise than by inheritance. *Court of Wards v. Kupulmun Singh*, 10 B.L.R. 364; *Gourend v. Collector of Monghyr*, 7 W.R. 5.

The rule excluding a lunatic or idiot, must be applied on very clear proof; it does not contemplate the disqualification of persons who are merely of weak intellect in the sense that they are not up to the average standard of human intelligence or endued with the business capacity to manage their affairs properly. *Surti v. Narain Das*, 12 All. 530, (distinguishing *Tirumamagal v. Ramaswami*, 1 Mad. 214).

An alleged incapacity founded chiefly on incapacity for speech due to paralysis is not a ground for exclusion. *Ran Bijai Bahadur Singh v. Jagutpal Singh*, 18 Cal. 111; 17 I.A. 173.

5. **Impotence.** also, in order to exclude a person, must be congenital.

6. One suffering from a **loathsome or incurable disease** is disqualified to be heir. But leprosy, in order to cause disability to inherit must be of a virulent and aggravated type and incurable. *Janardhan Pandurang v. Gopal*, 5 Bom. H.C.A.C. 145; *Ananta v. Ramabai*, 1 Bom. 554: *Rangaya Chetty v. Thanikachalla Mudali*, 19 Mad. 74.

As in other cases of incapacity, this incapacity must be strictly proved, *Isur Chunder v. Ranee Dasee*, 2 W.R. 125: also see 21 W. R. 249. As in the case of a mad man, a leper also is not incapable of holding property; and an estate already obtained by him cannot be divested by subsequent leprosy; he can make a valid gift of it. *Shama Churn Adhicaree, v. Roop Doss Byragee*, 6 W.R. 68.

7. **Illegitimacy,** is also a bar, in the case of the three higher classes.

8. **Adultery (incontinence)** is another ground of exclusion.

But in Bombay, a daughter is not debarred by incontinence from succession to the estate of her father. *Adrayapa v. Rudrawa*, 4 Bom, 104.

9. **Degradation:** Since the passing of Act XXI of 1850, exclusion from caste, whether by renunciation of religious or from any other cause, is no longer a ground for exclusion from inheritance. *Bhujjun Lall v. Gya Pershad*, 2 N.W. 446. This act does not apply only to a person who has himself or herself renounced his or her religion or been excluded from caste. The latter part of S. 1 protects any person fron having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste. This applies to a case where a person born a Mahomedan, his father having renounced the Hindu religion, claims by right of inheritance under the Hindu Law, a share in his father's family. *Bhagwant Sing v. Kallu*, 11 All. 100.

**Effect of Act XXI of 1850.**

**10.** One who has entered into an order of devotion is also excluded from inheritance. Such **renunciation** however must be absolute and final. *Tilak Chunder v. Shama Charan*, 1 Suth: 209.

11. **Murder** or **homicide** is another ground of exclusion.

In a recent case in Madras it was observed that "The question whether a Hindu who has been party to a murder is prevented from succeeding to the estate of the person murdered is not answered by the Hindu Law. But the principle that no one shall be allowed to benefit by his own wrongful act is of universal application. If the defendant was a party to the murder, her wrongful act, while not preventing the vesting in her of the inheritance, disentitled her to any beneficial interest in it. Such beneficial interest would vest in those who would be entitled to it were the guilty heir out of the way." *Vedanayaga Mudaliar v. Vedammal* 27 Mad. 591.

It is submitted, however, that the text of *Nârada* XIII, 21, precludes such a general remark to be passed uncontroverted. The first word of the couplet viz. *Pitridwit* (hostile to the *father)* is capable of bearing an interpretation which may lend support to the contention that a homicide cannot succeed under the strict letter of Hindu Law. The word *pitri* (पितृ) may be taken to mean and include not only the strictly literal equivalent *father*, but the general word *ancestor*, in the sense in which it is used in English Equity.

**Extent of the Incapacity**: The Incapacity is **purely personal** and does not affect the issue of the incapacitated person. According to Yajnavalkya. "Their *Aurasa* and *Kshetraja* sons are faultless and entitled to a share, while their daughters should be maintained until joined to their husbands. Their sonless wives of pure conduct should be given maintenance, and the incontinent or enimical ones expelled." *

The sons of the incapacitated persons will take only if they are capable of taking at the time the vesting becomes etc. *Kalidas Das v. Krishna Chandra Das* 2 B.L.R. (**F.B.**) 103. 11 W.R.O.C. 11. *Pareshmani Dasi v. Dinanath Das* 1 B.L.R.A.C. 117. *Bapuji v. Pandurang* 6 Bom. 616.

**Effect of the Disability or its removal.** Under Hindu Law an estate can never remain in abeyance, and if the claimant is not capable of succeeding at the time the descent takes place, the subsequent removal of his incapacity will not enable him to dispossess a person whose title was better than his, while the defect existed, though inferior to his own after its removal. *Bapuji v. Pandurang*. 6 Bom. 616.

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*औरसा: क्षेत्रजास्त्वेषां निर्दोषा भागहारिण: । सुताश्चैषां प्रभर्तव्या यावद्वै भर्तृसात्कृता: ॥ १४१ ।
अपुत्रा योषितश्चैषां भर्तव्या: साधुवृत्तय: । निर्वास्या व्यभिचारिण्य: प्रतिकूलास्तथैवच ॥१४२॥

The person suffering from the disability at once lets in the next heir who must succeed by his own merits. He will not be allowed to step into his father's place, *e.g.*, a man leaving a brother and an insane brother's son, the brother will take the whole estate, and the nephew will not be allowed to claim by subrogation under his father.

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**Examination: Short Summary:**— In this and in the following chapter, the student is asked to read the chapter *in gross*. The matter given in the chapters is in itself a summary of the Law and the student has therefore to master every detail given herein.

QUESTIONS:—1. Distinguish, Inheritance, Succession and survivorship, and show how each of these has undergone its development in Hindu Law.

2. Who according to the Laws of Mitakshara and Dayabhaga are entitled to inherit? Point out the difference between the two schools by special reference to the line of succession under each.

3. What is a Sapinda? How does the *Mitakshara* definition differ from that of the *Dâyabhâga?* Point out the effect of this distinction upon the two systems of inheritance.

4. What do you understand by a *bandhu?* Enumerate the *bandhus* under the Mitakshara as far as you can, prefacing your answer by general principles laid down by *Vijnaneshwara*.

5. Who can reunite? What is the effect of reunion and what rules govern the succession to the property of a reunited coparcener?

6 How do the sons, grandsons and daughters take under the *Mitakshara* and the *Dayabhaga* schools?

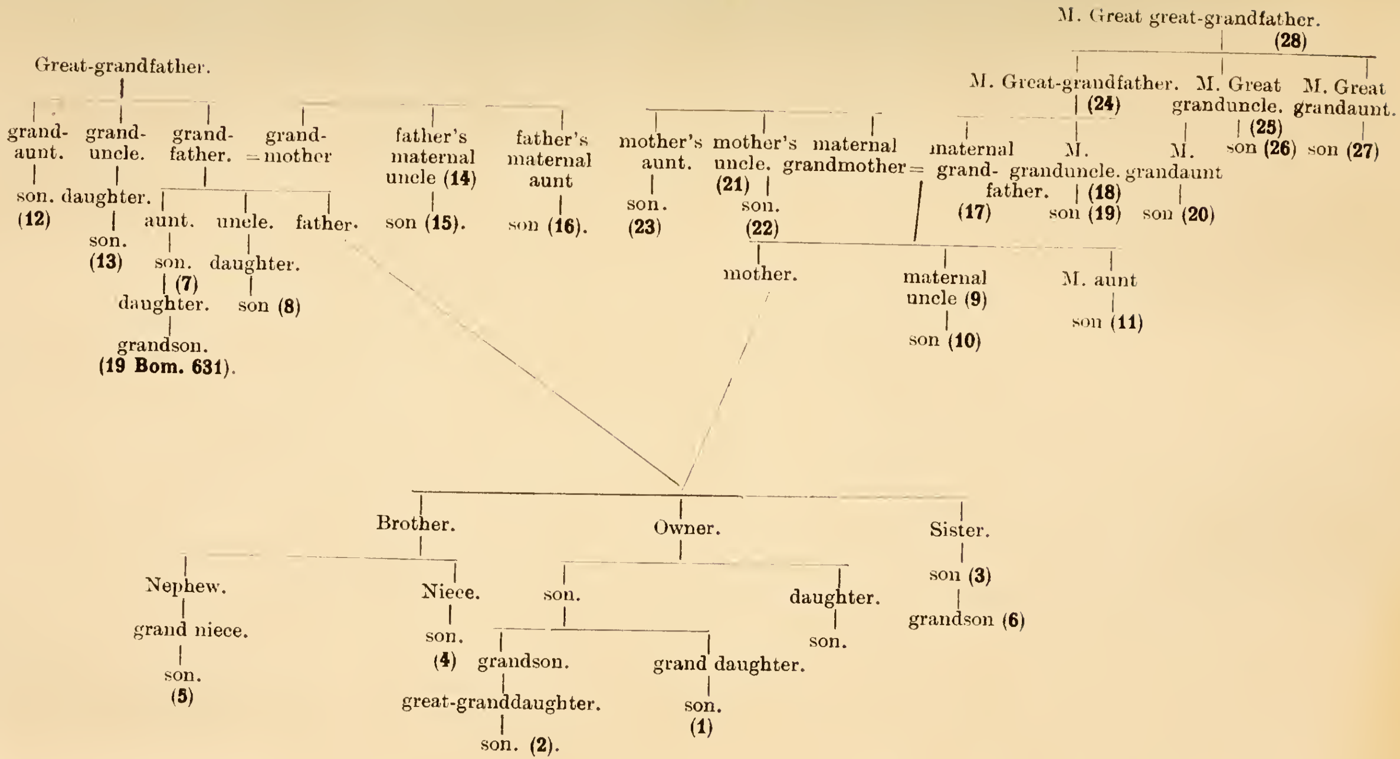
7. Estimate the position of a widow, mother and sister in the Hindu Law of Inheritance.

8. Who are excluded from inheritance according to Hindu Law? Mention the general principles laid down in texts.

9. What is the effect of a disability and of its removal?

(From Mayne's Hindu Law P. 763. Sixth Edition.)

**Bandhus.**



CHAPTER XII.

## Succession to Property belonging to a Female.

### A Woman's Estate Generally.

**General:** The property which a female takes, may be of two descriptions: (1) that special sort of estate, over which she has absolute control, even during her husband's life-time; and (2) all sorts of property of which a woman has become owner, whatever the extent of her right.

Property held by a woman, may also be looked at from (1) whether it was inherited from a male owner or (2) whether taken in any other way.

**General nature of Stridhan.** In speaking of *Stridhan* technically so called, the first sort *i.e.* inherited from male is excluded. According to the strict letter of Hindu Law, absolute estate is the rule and restriction is the exception. This is the general rule in Western India and an exception to this rule is the case of a widow of a gotraja Sapinda inheriting from her husband. The decisions show a drift somewhat opposed to this; but now see the case of *Gandhi Maganlal v. Bai Jadhab*, 24 Bom. 192 (**F.B.**) Pages 214 and 217.

Females taking or holding property may be grouped into two classes:

(1) those who enter the family by marriage *e.g.* a widow, a mother, grandmother &c. and,

(2) those who leave it by marriage *e.g.* daughter, sister &c.

(1) **Widow's estate.** Not an *estate for life* (as that expression is used in English Law.) Hindu Law knows nothing of estates for life, or in tail, or in fee. It measures estates not by duration, but by use. Its distinctive feature is that, at her death, it reverts to the heirs of the last male holder. She never becomes a fresh stock of descent. *Collector of Mussalipatam v. Cavaly Venkata*, 8 M.I.A. 529; *Kery Kolitany v. Moneeram*, 13 B.L.R. 53; *Lallubhai v. Mankorbai*, 2 Bom. 388.

**Nature of the estates taken.**

(2) **A Daughter,** takes an absolute estate, under the *Mayukha* and *Mitakshara* *Pranjeewandas v. Dewacoorerbai*, 1 Bom. H. C. 130, *Bhagirthibai v. Kanhoji Rao*, 11 Bom. 285; *Jankibai v. Sundra*, 14 Bom. 612.

**Sisters:** Except in Bombay, and a single instance in Madras, their claim is not recognized in India. In Bombay they take an absolute estate. *Vinayaka Rao v. Luxmibai*, 1 Bom. H.C. 117: *Taljaram v. Mathuradas*. 5 Bom. 671: *Rindabari v. Anacharya*. 15 Bom. 206. In Dharwar, she is preferred to a brother's widow: *Rudrapa v. Irava*, 28 Bom. 82.

**Descent of property taken absolutely by a female heir.** According to the earlier decisions, her heirs are the heirs of such property. *Navalram v. Nandkishore*, 1 Bom. H.C.R.209; *Bhaskar v. Mahadev*, 6 Bom. H.C. (O.C.J.) 1. But West J. in *Vijayarangam v. Luxman* 8 Bom. H.C.R. (O.C.J.) 244, held that "according to the *Mayukha*, inherited property, though it is *stridhan*, not being one of those kinds of *stridhan* for which express texts prescribed exceptional modes of descent, goes on the woman's death, to her sons and the rest, as if she were a male: and this notwithstanding her having daughters. "The same interpretation was adopted later on in *Bai Narmada v. Bhagwantrai*, 12 Bom. 505 and in *Dalpat Narotam v. Bhagwan*, 9 Bom. 30. These decisions were given in this way on because of the wording of the *Mayukha* which says "sons and the rest." Telang J: examined all these cases and has explained the text thus:—"the heirs to *stridhan* proper and *stridhan* improper are identical, save that, as between male and female offspring, the latter have a preferential right as regards *stridhan* proper, while the former have a similar right as to *stridhan* improper." *Mani Lal v. Bai Reva*, 17 Bom. 758. (This interpretation of this passage may now be accepted as final. See also *Sheo Shankar Lal v. Debi Salhai* 25 All. 468 (**P.C.**) and cases in Page 473 also p. 476.

In **Western India,** the daughter and the sister take an absolute interest in property, inherited by them, and after their death, such property devolves on their heir and not on those of the last male owner. This result takes place in the Bombay Presidency whether the case is governed by the *Mitakshara* or the *Mayukha*, *Bhagirithi Bai v. Kanhuji Rao*, 11 Bom. 285.

In the Maratha country, including the Ratnagiri, the authority of the *Mitakshara* being paramount, the property inherited by a daughter from her father, descends, after her death, to her daughters to the exclusion of her sons. *Jankibai v. Sundra*, 14 Bom. 612.

**Extent of a Woman's Estate.** (Widow's): Its nature must be described by restrictions placed upon it, and not by terms of direction. It is not a *life estate* (as such), nor an estate held in trust for reversioners.

She is not bound to save, nor to invest and if she invest, not bound to prefer one form to another. She is forbidden to commit waste, or endanger the property, but shorth of that, she may spend the income and mange the principal as she thinks proper. If she makes savings, she can give them away as she likes during her life, and is not bound to leave behind her more than what she received. Within the limits imposed upon her, she has the most absolute power of enjoyment.

C. On the other hand, the limitations imposed upon her, are the very substance of its nature, and not merely imposed for the benefit of reversioners. They exist as fully when there are absolutely no heirs to take after her, as when there are.

If there be collateral heirs of the husband, she cannot alien of her own free will, except for special purposes. She has a wider latitude of dispositions for religious, chartiable or spiritual purposes.

Her power over **accumlations**: These may be

(*a*) Made by the last male holder.

(*b*) Made between his death and delivery of property to her.

(*c*) Made by her.

(*a*) Those made by the last male holder, would be accretions to the estate and follow it. She would take the whole as entire estate, subject to usual restrictions. *Soorjeemoney v. Deenobandu*, 5 M.I.A. 526.

(*b*) Those made between death and deliver of property to her are also treated as accretions to the estate and can only be dealt with in the same way.

(*c*) The application of this rule would depend upon the amount of such savings, and the form they had assumed. Debts etc. properly incurred by her, while out of possession, would be a good charge upon the accumulations, just as upon the corpus. *Isri Dutt v. Hanobutti*, 10 I.A. 150: see also *Dalel Kunwar v. Ambika Pratap*, 25 All. 266. "A widow's savings from her husband's estate are not her *stridhan*: if she has made no attempt to dispose of them in her life-time, there is no dispute but that they follow the estate from which they arose. The dispute arises, when, the widow, who might have spent the income as it accrued, has in fact, saved it, and afterwards attempts to alienate

it. It is not possible to lay down any sharp definition of the line which separates accretions from income held in suspense in the hands of the widow, as to which she has not determined whether she will spend it or not.

A sum of money representing rents accruing during the last year of the widow's life, was held to pass to her representatives and not to the reversioner. *Revett Curnac v. Jivibai*, 10 Bom. 478.

The case of *Isri Dutt v. Hansbutti*, was referred to and distinguished in Madras, where it was held that "savings, or property purchased out of savings by widow out of money awarded to her by decree as maintenance are, her *stridhan*, and pass to the heirs to such property. The court remarked.

There is no necessary connection between the limited nature of the estate which a widow takes in her husband's property and the interest accruing to her in the income derived by her as such limited owner. That which becomes vested in her in her own right and which she can dispose of at pleasure is her own property, not limited but absolute, exclusive and separate, in every sense of the term, and devolves as such. As, in the present state of the law, the income is completely dissociated from the corpus, there is no presumption that savings or purchases with savings effected by a widow are increments to the corpus of the husband's estate and pass together with it. *Akkanna v. Venkayya*, (I.L.R., 25 Mad., 351), approved; *Saodamini Dasi v. The Administrator-General of Bengal*, (L.R. 20 I.A., 12), followed; *Isri Dut Koer v. Mussumut Hansbutti Koerain*, (L.R., 10 I.A, 150,) distinguished; *Soorlah Dossee v. Bhoobun Mohun Neoghy*, (I.L.R. 15 Cal. 292), *Beni Parshad v. Puranchand*, (I.L.R.; 23 Calc., 262); *Chiddu v. Naubat*, (I.L.R., 24 All., 67); and *Sheo Shangar Lal v. Debi Sahai*, (I.L.R., 25 All., 468), commented on. *SubramanianChetti v. Arunachelam Chetti*, 28 Mad. 1.

Accordingly, these restrictions would not apply to property which has passed to a female, not as heir, but by deed or other arrangement, which gives her power of appropriation of the profits. In such a case the accumulations are her absolute property, and pass to her representatives, and not to the heirs of the last male holder. *Bhagubutti v. Chowdhry Bholanauth*, 2 I.A. 256.

But the mere fact that a Hindu female takes under a deed or will or arrangement, that to which she is really entitled as heiress, does not necessarily enlarge her powers. The question being, *what estate* did she take? not, how did she take it? *Morali Mahomad v. Sheink Ram*, 2 I. A. 7, *Laxmibai v. Hirabai*, 11 Bom. 69.

**Purposes for which she may assign, or alienate;** a widow may mortgage or sell the estate for (A) Religious purposes, (B) Charties, (C) Maintenance and (D) necessity. Of these in order.

**A. Religious purposes:** include.

(1) The performance of funeral obsequies and ceremonies incidental thereto. See *Dalal Kunwar v. Ambika Partal* 25 All. 266.

(2) Pilgrimages &c. according to the position of the widow in society; the expense must be limited by due regard to the entire bulk of the property.

(3) Expenses for the ceremonies of other members, which the husband was bound to perform. *e.g.* funeral of the mother &c.

(4) Husband's debts are binding upon the widow, unles they were contracted for immoral purposes and the obligation is not affected by the statute of Limitation or any other bar at law. *Chimnaji v. Dinkar*, 11 Bom. 320; *Kandappa v. Subba*, 13 Mad. 189; *Udai Chunder v. Ashutosh*, 21 Cal. 190; and the same principle was applied to a widowed daughter-in-law in possession of the estate of her father-in-law in *Bhau Babaji v. Gopal*, 11 Bom. 325.

*N. B.*—If a widow prefers one creditor to another, and the preference was made in ignorance of a fact that the debts to one were barred, those who profit by it, would be in the position of a person dealing with an inexperienced woman and would not be allowed to profit by it. *Rangilbai v. Vinayak*, 11 Bom. 666; such a preference in the case of an insolvent estate would be fraudulent and void.

**B. Charities,** include (1) a portion to a daughter; (2) building temples for religious worship; (3) digging tanks and the like, (4) gifts to Brahmins and idols, if to a small extent, would be good and valid against reversionors. *Jugjeewun v. Deo Shunkur* 1 Bom. 394.

**C. Maintenance,** of those whom the last male owner was bound to maintain as well as of hereself; and the marriage expenses of those who were entitled to these being defrayed out of the property, are purposes for which she may sell &c. *Sadashir v. Dhakubai*, 5 Bom. 540.

**D.** The last is **necessity:** This cannot be defined. In this case, her position is just that of a manager and the principles in *Hunoman Pershad's* case apply to her acts.

**Instances of necessity: (1) Government Revenue:** In the case of an actually existing necessity for an advance of money, the circumstance that this necessity is brought about by previous mismanagement does not vitiate the loan, unless the lender himself was a party to bring about the mismanagement. *Hanooman Pershads* case; followed in *Luxman Bhau v. Radhabai*, 11 Bom. 609.

(2) **Costs of** maintaining or defending **suits** may justly be met by a widow, from out of the estate. *Amjad Ali v. Moniram,* 12 Cal. 52; *Indar Kuar v. Lalta Prasad,* 4 All.. 532.

(3) Necessary **repairs** of the property would be a good ground of supporting a debt contracted, and the debt would be a charge upon the estate in the hands of the reversioner. *Harry Mohun v. Ganesh Chunder,* 10 Cal. 823.

*N. B.*—In the case of a necessity, she is not bound to borrow money, or mortgage the estate, and thus reduce her income; but she may sell.

**Personal obligation of the widow—How far binds husband's estate?** A person dealing with a widow and wishing to bind the husband's estate in the hands of reversioners, must show (**1**) that the dealing was one in respect of which, the widow was authorized to bind the estate (**2**) that she intended and (**3**) was supposed, to do so.

The Courts of Bombay, Madras and Allahabad, have refused to hold reversioners liable to satisfy bonds executed by a widow as security for loans contracted by her, which neither specifically pledged the estate, nor purported to be executed by her as representing the estate, though, in each case, the object of the loan was one for which the widow might legitimately have bound her successors. *Gadgeppa v. Appaji,* 3 Bom. 257: *Ramasami v. Sellatammal.* 4 Mad. 375 : *Dhiraj Sing v. Manga Ram.* 19 All. 306.

In cases which otherwise would not justify a sale by a female, the transaction will be rendered valid by the **consent of heirs.**

*Leading case. Behari Lal v. Madho Lal.* 19 I.A. 30, where it was held, "that according to Hindu Law, a widow can accelerate the estate of the heir, by conveying absolutely, and destroying her life-estate" Note the following cases from *Bengal: Nobo Kishore v. Hari Nath,* 10 Cal. 1102 (**F.B.**). *Madras*: *Marnthamuthu Nadan v. Shrinivasa Pillai,* 21 Mad. (**F.B.**) 128; and *Allahabad*: *Ramphal Rai v. Tula Kuari,* 6 All. 116 (**F.B.**). Bombay Law: *Hunsraj v. Bai Maghibai* 7 Bom. L.R. 622.

In *Varjivan v. Ghelai,* 5 Bom. 563/571. a widow and a daughter, conveyed to the defendants. It was held that the grant was invalid as against the plaintiff who, on the death of the daughter before her mother, became next heir. The court said.

"It may be taken as well established that the consent of heirs will render valid an alienation by a widow under circumstances, which would not otherwise justify it. But the question who are heirs whose consent will thus render the alienation indefeasible has led to much conflict of decision.

"And referring to the decision of the Privy Council in *Raj Lukhee Dabea v. Gokool Chunder Chowdhry*, 13 M.I.A. 228, the court laid down the rule; that the kindred in such cases must generally be understood to be all those who are likely to be interested in disputing the transaction—at all events the consent must give rise to a presumption that the transaction was a fair one, and also one justified by Hindu Law."

**Effect of Execution for the debt of a female:** Where the suit is founded upon a purely personal debt or contract of her own, the decree can only be against her own person and property; and a sale in execution will only convey her own interest in the property. *Narâyan Maya v. Vasteva*, 17 Mad. 208; *Braja Lal v. Jiban Krishna*, 26 Cal. 285. But, even though the foundation of the decree be a liability which might bind the reversioner, that alone is not sufficient. The suit must be so framed as to show that it is not merely a personal demand upon the female in possession, but that, it is intended to bind the entire estate and the interests of all those who come after her. The plaintiff is bound to give notice, that he is seeking so large a remedy, in order to put those who may be ultimately affected, upon their guard and to enable them to protect themselves. *Nugendar v. Kaminee*, 11 M.I.A. 267.

In cases where she is sued not personally, but as representing the estate and for the debts of the last male holder, there are two cases: (1) The decree may have been passed during the life-time of the male holder and in this case, if execution was not taken out, it may be taken against the representative of the estate, without instituting a regular suit. (2) But the case would be otherwise, where no decree was obtained against the male holder and in that case it is necessary to bring or revive the suit against his representative, whether male or female. *Natha v. Jammi*, 8 B.H.C. (A.C.J.) 41; *Jatha Naik v. Venkatappa*, 5 Bom. 14, *Akoba Dada v. Sakharam*, 9 Bom. 429.

*N. B.*—The basis of the suit against her is, that the estate which she holds is bound, and that she is compellable to pay, not out of *her* assets, but out of *the* assets.

**Her power over her husband's Self-acquisitions** is not greater than that over the ancestral. *Mt. Thakur v. Rai Baluk Ram*, 11 M.I.A. 139; See also *Bechar Bhagwan v. Bai Lakshmi* 1 Bom. 56; *Mayaram Bhairam v. Motiram Govindram* 2 Bom. 331.

But among Agarwalla Banias of the Saraogi sect of the Jain religion, a widow has full power of alienation in respect of the non-ancestral property of her deceased husband; but she has no such power in respect of the property which is ancestral. *Shambhu Nath v. Gayan Chand*, 16 All. 379.

**Her Power over moveables.** It was laid down in Bombay that a widow during her life-time has absolute power over moveables, inherited by her from her husband, and may dispose of such property by will. *Damodar Madhowjee v. Purmanandas*, 7 Bom. 155. Much doubt was thrown on this case in the subsequent Full Bench case of *Gadadharbhat v. Chandrabhagabai*, 17 Bom. 690, where it was held that under the *Mitakshara* law, a widow has no power to bequeath moveable property inherited by her from her husband. Four years afterwards, a Division Bench (Parsons and Ranade JJ.) of the same court held, that a widow in Gujarat, under the law of *Mayukha*, had power to bequeath moveable property taken by her under the will of her husband which gave her express power of disposition, Ranade J. observing:—"It appears to me that the testator intended to place no restrictions upon the disposal of the moveable property that might remain,............ with such power, she can even bequeath immoveable property. *Shet Mulchand v. Bai Mancha* (7 Bom. 491)......There is a three-fold distinction (1) between the moveable and immoveable property, (2) between title by bequest and title by inheritance. (3) and a distinction between the Mayukha and Mitakshara, which must be borne in mind before the rights of a widow in Gujarat, claiming under a will, which gave her express powers of free disposition............, are negatived by the sole authority of the Full Bench decision quoted above." *Motilal v. Ratilal* 21 Bom. 170-174. This decision was based on an express power given to the widow. The Full Bench case (in 17 Bom.) was followed very recently, where it was held, that a widow has no power to bequeath by will, moveables, *inherited* by her from her husband. *Chaman Lal v. Ganesh*, 6 Bom. L.R. 460. (A case under the Mayukha).

**Bombay.**

From all these cases it will be seen that *inherited* moveables, if not disposed of by her, pass, on her death, to the next heir of her husband, and cannot be seized in execution of a decree against the widow for her personal debts. *Hari Lal v. Pranvullubhdas* 16 Bom. 229; *Bai Jumna v. Bhai Shankar*, Ibid 233; and referring to the case in 7 Bom. 155, the court remarked that "if that case is to be regarded as necessarily giving to the heir of a widow on her death such moveables as remain undisposed of by her, it must be treated as of no authority.

**Suits and other remedies against the widow:—I. Who may sue?** A mere stranger cannot sue. No one except those, who have an interest in the succession, and who would be injured by the acts complained of, can sue. A reversioner to whom the interest is transferred during widow's life-time, is not precluded from questioning any previous incumbrance by her. *Indur Kuar v. Lalta Prosad*. 4 All. 532.

**Remote Reversioner:** The question what reversioners are entitled to bring a suit has been the subject of discussion at the bench. The law has thus been very recently summarized in *Abinash Chandra Mazumdar v. Harinath*, 32 Cal. 62 at 65. "It is now settled beyond dispute by the decisions of the Judicial Committee, that the nearest reversioner who is the presumptive heir in succession, though such reversioner has only a contingent interest, may bring a suit for a declaration that the acts of a female heir in possession, do not bind the estate. *Raj Lukhee Debea v. Gokool*, 13 M.I.A. 209; *Goolab v. Rao Kurun*, 14 M.I.A. 176; *Jumoona v. Bama Soondari*, 3 I.A. 72. It is equally well settled that a remote reversioner cannot maintain such a suit, unless the immediate reversioner has fraudulently colluded with the female heir, or, for some reason or other, has made it impossible for him successfully to challenge the acts of the female heir. *Anand Kunwar v. Court of Wards*, 8 I.A. 14." But the case would be otherwise, where the immediate reversioners, instead of being males taking an absolute estate, are females, who take in succession and are entitled only to a life estate. In such a case, the remote male reversioner is entitled to bring a declaratory suit. (Ibid).

But an assignee of a reversioner cannot sue by right of subrogation. *Rai Charan Pal v. Peari Mone*, 3 B.L.R. 70 (O.J.) Cf. S. 6 of Act IV of 1882.

An adopted son may bring a suit for setting aside an alienation made his adoptive mother. *Lakshman Bhau v. Radha Bai*. 11 Bom. 609.

II. **For what they may sue?** (1) A reversioner can only bring a suit for an act which is injurious to his interests in future. (2) Moreover, he cannot bring a suit for possession of any property during the widow's life-time. The utmost that he can ask for is a declaration that her act is void or not binding upon the estate beyond her life-time. *Isri Dutt v. Hansbutti*. 10 Cal. 324: *Gobinda Monee Dasi v.*

*Shyam Lal Bysack.* Suth F.B.R. 165. **(3)** Nor can he bring a suit for restraining future alienations. The validity of each alienation depends upon the circumstances of each case, and cannot be determined upon before hand. *Pranpati Kunwar v. Pooran Kunwar*, S.D. of 1856, P. 494. **(4)** A reversioner cannot maintain an action for declaration of title as next heir: for, until the death of the female in possession, it is not possible to say who will be the next heir. *Chottoo Misser v. Jemah Misser*, 6 Cal. 198: *Sham Sundaree v. Jamona*, 24 W. R. 86. **(5)** He can restrain waste by the widow. But in such a case, he can only ask for an injunction: and for this he must allege and prove, specific acts of waste, or mismanagement or any other misconduct. And unless this is done, no order whatever can be passed against the female heir. *Hurrydoss v. Uppornah*, 6 M.I.A. 433: *Subba Reddi v. Chengalamma*, 22 Mad. 126. **(6)** The reversioners will be equally entitled to restrain unlawful acts of strangers holding under the widow. *Gobindmani v. Shamlal*, B.L.R. Suppl: Vol. 48: *Kamanadhani v. Joysa*, 3 Mad. H.C.R. 119. But in such a case, actual disposion of the intermediate estate, or waste, or injury, must be proved. *Suraji Bansi Kuar v. Mahipat*, 7 B.L.R. 669. In any case, it was settled that the next reversioner might bring a suit for a declaration that the adoption was invalid, as he might otherwise lose the evidence which would establish its invalidity, when the occasion arose. *Thayammal v. Venkatarama*, 7 Mad. 401: *Anyaba v. Daji*, 20 Bom. 202: and under special circumstances, even a more remote reversioner may sue. *Ramabai v. Rangrao*, 19 Bom. 614.

**Only two kinds of Acts give rise to declaratory suits by reversioners:** *Viz:* (1) Adoption and (2) alienations. In both these cases, the only point for consideration and determination is, when did the cause of action accrue to the plaintiff reversioner? And on this question there is a conflict of opinion among several High Courts, some holding that under Arts. 118, 119 of Act XV of 1877, the cause of action arises from the date when plaintiff comes to know of the alleged adoption; and a subsequent suit for possession of property, the title to which is dependent upon the invalidity of the adoption, would be barred if the suit as to adoption is not brought within six years. *Shrinivas v. Hanmant*, 24 Bom. 260. (**F.B.**) *Narayen v. Jessang*, 25 Bom. 126; *Ratnamasari v. Akilandammal*, 26 Mad. 291; but contra. Ibid Per Bhashyam Ayyangar J. and *Chandania v. Shalig Ram*, 26 All. 40. *Lali v. Murlidhar*, 24 All. 195.

**Adoptions.**

A similar conflict exists as to suits for alienations by a widow. This is more or less due to an improper or imperfect consideration of the Limitation Acts that were passed from time to time.

**Alienations.**

The last of these is the Act XV of 1877, Article 125 (Schedule II) of which provides, that a suit "during the life of a Hindu female by a Hindu who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land, declared to be void except for her life" must be brought within *twelve years* from the date of alienation, and under this article the suit must be brought within the statutory period, otherwise it would be time-barred. But the question arises, whether limitation which has become a bar to some *i.e.* immediate reversioners, can also bar the right of the remote reversioners. On this point there is a conflict. In *Pershad Singh v. Chedee Lal*, 15 W.R. 1, the Calcutta High Court held that, upon an improper alienation made by a Hindu widow, one cause of action arises in favour of all the reversioners, near and remote, entitling each of them to maintain a declaratory action, and that consequently, if the nearest reversioner allowed the statutory period to elapse, the cause of action would be extinguished, and would not be revived in favour of other reversioners who might subsequently come into existence and attain majority. The same view was expressed by the Bombay High Court in *Chhaganram v. Motigarri*, 14 Bom. 512. The substantial changes effected in the law by the Acts of 1871 and 1877, appear to have been overlooked in the case last cited. Accordingly, the Allahabad High Court, dissenting from this case in *Bhagwanta v. Sukhi*, 22 All. 33, held, that when there are several reversioners entitled successively, no one of these, can rightly be said to claim through or derive his title from another, but he derives his title from the last full owner; and consequently, although the right of the nearest reversioner to contest an *alienation* or *adoption* may have become barred, this will not bar the similar rights of the subsequent reversioner." (In this case the immediate or intermediate reversioner was the father, whose son happened to be the remote reversioner.) This case was cited with approval in *Gobinda Pillai v. Thayyammal*, 14 Mad. L.J. 209: 28 Mad. 57 and in *Abinash Chandra Mazumdar v. Harinath Shaha*. 32 Cal. 62.

In suits between the reversioners and alienees of the widow, the only question is whether the alienation was for a necessary and lawful purpose, or not. If it was, it binds the reversioner. If it was not, so much as was not for a necessary purpose, does not bind him. The reversioner may have the transaction set aside, if the widow sold a larger portion

than was necessary to meet the necessity. This relief, however, is very rarely granted, unless it is shown that the purchase was in fraud of the reversioner's interests. On the other hand, if it be found that the funds were sufficient and no sale was necessary, the sale may be set aside to the transaction treated as a mortgage. *Shumsool v. Shewakram*, 2 I.A. 7; *Sadashiv v. Dhakubai*, 5 Bom. 450.

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## B. *Stridhan*. What it is and its kinds.

**General:** None of the texts gives any exact definition of *Stridhan*. They enumerate and describe different kinds of *Stridhana* without aiming at any logical classification; nor is the number of its kinds definitely settled. A rough idea may be obtained of what *Stridhan* is together with its kinds from the following texts.

अध्यग्न्यध्यावाहनिकं दत्तं च प्रीतिकर्मणि । भर्तृमातृपितृप्राप्तं षड्विधं स्त्रीधनं स्मृतम् ॥
मनुः ९. १९४.

"What was given before the nuptial fire (अध्यग्नि) what was given on the bridal procession (अध्यावाहनिक) what was given in token of love प्रीतिदत्त) and what was received from a brother, a mother, or a father, are considered as the six-fold separate property of a married woman."

To the same effect may be compared the following:—

"पितृमातृसुतभ्रातृदत्तमध्यग्न्युपागतम् । आधिवेदनिकं बंधुदत्तं शुल्कान्वाधेयकमिति" विष्णुः,
अध्यग्न्यध्यावाहनिकं भर्तृदायस्तथैव च । भ्रातृमातृपितृप्राप्तं षड्विधं स्त्रीधनं स्मृतम् ॥
नारदः १३. ८.

*Kátyayana:* Mentions the same kinds as *Manu*. He has defined these as will be seen further. *Yajnavalkya* gives the same with a slight change which has caused a difference of opinion among the several schools. According to him:—

पितृमातृपतिभ्रातृदत्तमध्यग्न्युपागतम् । आधिवेदनिकाद्यंच स्त्रीधनं परिकीर्तितं ॥ २. १४३.
बन्धुदत्तं तथा शुल्कमन्वाधायकमेव च ॥ २. १४४./२.

"What was given (to a woman) by the father, the mother, the husband, or a brother, or received by her before the nuptial fire (अध्यग्न्युपागतम्), or presented to her on her husband's marriage to another wife (आधिवेदनिक), and the rest

( आद्यंच ) is denominated *Stridhan.* So, that which is given by kindred, as well as her fee and anything bestowed after marriage."

Passing from these to the secondary *Smritis i.e.* commentaries and digests, we have the *Mitakshara*, which in its commentary on *Yajn.* II, 143. after explaining the several words indicative of several varieties of *Stridhana*, says that that word is used, not in its *technical* but in its *etymological* sense: so that, according to it, property of any kind acquired by a woman is her *Stridhan* ( आद्यशब्देन रिक्थक्रयसंविभागपरिग्रहाधिगमप्राप्तमेतत् स्त्रीधनं मन्वादिभिरुक्तम् । स्त्रीधनशब्दश्च योगिको न पारिभाषिकः । योगसम्भवे परिभाषाया अयुक्तत्वात्) Page 209.

By the word *Adya*, property obtained by inheritance, purchase, partition, acceptance, finding: all this is *Stridhana* according to Manu and the rest. The term *Stridhana* conforms in its import with its etymology, and is not technical: for, if the literal sense be admissible, a technical acceptation is improper."

*Nilakanta* (auther of the *Vyavahara-Mayûkha)* accepts the interpretation of *Vijnaneshwara*, but, in treating of succession, draws a distinction between *paribhasika Stridhan* ( पारिभाषिकस्त्रीधनं ) and what is acquired by the act of partition and the like. Thus, he also assigns to the simple term *Stridhana* the same unlimited signification as the author of *Mitakshara.* "Considering the high authority of the *Mitakshara*, and the clear language in which it declares that property inherited by a woman does constitute her *Stridhana*, one cannot help feeling doubts as to the correctness of the decisions to the contrary. At the same time, considering their number and the fact that some of them are from the highest judicial authority, it would perhaps be too late to expect any departure from the rules laid down" *e.g.* It has now been settled that property acquired by a woman by inheritance constitutes *Stridhan* in no case in **Bengal**, and becomes *Stridhan* in **Bombay** in all cases except that of property inherited by a widow from her husband. See *Sheo Shankar Lal v. Debi Sahai*, 25 All. 468 473. **(P.C.)** and cases cited.

Under the Benares School, as elsewhere property inherited by a female from a female does not become her *Stridhan* in such a sense that on her death it passes to her Stridhan female heirs to the exclusion of male heirs. *Ibid;* there is no distinction as to the nature of the estate taken by her in this case from that taken by her from a female, so that, after her death, there is a revertor. *Sheo Partab Bahadur Singh v. The Allahabad Bank*, 25 All. 176 **(P.C.)**

**Kinds of:** From these extracts, the following kinds of Stridhana may be noted.

1. **Adhyagni**[1] ( अध्यग्नि ) which is given to a woman, at the time of marriage, near the nuptial fire, is called Adhyagni. It usually consists of ornaments, clothes, money, etc.

2. **Adhyawahanika**[2] (अध्यावाहीनक) that which she receives, while she is conducted from the parental abode to her husband's dwelling and would include presents from the time of her marriage down to that of her maturity.

3. **Anwadheyaka**[3] (अन्वाधेयक) what is received by a woman from the family of her husband or parents after marriage. It extends to gifts from parents as well as those from a husband. *Sitabai v. Wasantrao*, 3 Bom.L.R. 201.

4. **Bhartri Datta** ( भर्तृदत्त ) Property given by the husband.

5. **Shulka**[4] (शुल्क) This species has different indications in different schools.

(*a*) According to *Mitakshara* ——— whatever is received by the kindred (बंधुभि: ) *i.e.* the maternal and paternal kindred, in exchange of which the damsel is given."—the pride-price.

(*b*) Acc: to the *Dayabhaga* (1) a special present to the bride to induce her to go cheerfully to the mansion of her lord. IV. 1 p. 6.

(2) Or even presents by strangers for the exercise of her influence with her husband or her family. IV 3 p. 20.

(*c*) Acc: *Viramitrodaya* it is the value of household utensils and the like, taken (by the parents) from the husband, and the rest, in the shape of ornaments for the girl.

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1 विवाहकाले यत्स्त्रीभ्यो दीयते ह्यग्निसंन्निधौ । तदध्यग्निकृतं सद्भिः स्त्रीधनं परिकीर्तितम् ॥
कात्यायन.

2 यत्पुनर्लभते नारी नीयमाना पितुर्गृहात् । अध्यावाहनिकं नामस्त्रीधनं परिकीर्तितम्॥कात्यायन.

3 विवाहात्परतो यत्तु लब्धं भर्तृकुलात्स्त्रिया । भर्तुः पित्रोः सकाशाद्वा अन्वाधेयं तु तद्भृगुः ॥

4 गृहेपिस्करबान्धानां दोह्याभरणकर्मिणाम् । मूल्यलब्धं तु यत्किंचित्तुल्यं तत्परिकीर्तितम् ॥
Do, Do.

(*d*) Acc: to *Katyayana* (cited in *Mayûkha*) Whatever is obtained as the equivalent of household utensils, of beasts of burden, of milch cattle, or ornaments, is declared (to be) *Sulka*."

6. **Saudayika**[2] (सौदायिक) What is received by a married woman or by a maiden in the house of her husband or of her father from her husband, or from her parents, is termed *Saudayika.*

This term is not used in contradistinction to *Anvadheya* in connection with succession to *Stridhan*. *Sitabai v. Wasant Rao*, 3 Bom. L.R. 201.

7. **Pritidatta**[3] (प्रीतिदत्त) including *padarandanika* (पादवंदनिक) Whatever is given through affection. by her mother-in-law or her father-in-law and *padarandanika*, or what is received on her saluting the feet of elders. in termed pritidatta.

8. **Adhivedanika** (आधिवेदनिक) Presents given to a senior wife on the occasion of the husband's marriage with another wife. (*Yajnavalkya* sets this down as equal to the expenses of the second marriage, when the superseded wife has got no *Stridhana*, and half of it. when she has got some *Stridhan*. See II 148).

9. **Yautaka** (यौतक) (with its correspondent **Ayautaka** (अयौतक) "According to *Madana. Yautaka* is that which is obtained by a woman at the time of marriage or other (ceremony) whilst seated with her husband on one seat ( विवाहादिसमये पत्या सहैकासने प्राप्तं Vy. M. P. 61. L 27). Vy. M. Page 96 Ll. 11 and 12.

10. **Maiden's property**—given to her by her affianced bridegroom, or by her own family. or property which she had inherited from others than males.

11. **Savings** made by her from her *Stridhan* and **purchases** made with it. So also property obtained by a compromise of her rights to *Stridhan* would be her Stridhana. Where property had been inherited by a widow from her husband and afterwards confiscated by

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2 ऊढायाः कन्यकाया वा पत्युः पितृगृहेऽपि वा । भ्रातुः सकाशात्पित्रोर्वा लब्धं सौदायिकं स्मृतम् ॥
See also *Veda Vyāsa.*

3 प्रीत्या दत्तं तु यत्किंचिच्छ्वश्र्वा च श्वशुरेण वा । पादवन्दनिकं चैव प्रीतिदत्तं तदुच्यते ॥

Government, such property on being subsequently granted to the widow by a *sunnud* from Government, was held to rank as her *Stridhana. Brij Indur Bahadur Singh v. Rani Janki Koer*, 1 C. L.R. 318.

12. Wealth earned by a woman by the mechanical arts (1) if earned during widowhood or maidenhood would be her *Stridhana* under all the schools (2) if earned during coverture, would be her *Stridhana* only in the *Benares* and the *Mitakshara* Schools and nowhere else.

13. **Arrears of maintenance:**

**Essentials** of all these:—excepting the case of maiden's property (No. 10 above), all these (1) belong to a married woman (2) are given to her in her capacity of bride or wife and (3) except perhaps in the case of purely bridal gifts, they are given by her husband or by his or her relations.

**Her rights over her Stridhana.** Her property taking it in its widest sense, falls under three heads:

(1) Property over which she has absolute control.

(2) ,, ,, ,, her control is limited by husband, but by him only.

(3) ,, which she can only deal with, if at all, for limited purposes.

Her husband again has, under certain circumstances, a qualified right to use all her *Stridhan*, of whatever description.

Thus it will be seen that in cases other than where she has absolute control over *Stridhan*, the limitations upon her power will be determined (1) by regard to her *status* *i.e.* a maiden, a married woman during coverture, and a widow or (2) by regard to the nature of the property under consideration.

**I. Property over which she has absolute power.**

Before going into these cases, it may be remembered generally, that *Saudayika* of all sorts, whether moveable or immoveable, which has been given by her relations, with the exception of gifts from the husband, and *Saudayika* of a moveable character which has been given by the husband are absolutely at her own disposal. She may spend, sell, device or give it away at her own pleasure. *Damodardas v. Parmandas*, 7 Bom. 155.

II. Restrictions depending upon the *status* of the woman *i.e.* (1) before the marriage, (2) during the conntinuance of marriage and (3) after husband's death.

**Before marriage.**

(*a*) "During maidenhood, excepting the disqualification by reason of nonage, a Hindu female labours under no other incapacity as regards her power over her *Stridhan;* and except in the capacity of a guardian, her father and other relations have no control over it." *Bannerji.*

**During Coverture.**

(*b*) The husband can use the wife's *Stridhan* strictly so called, (*i.e.* her *Saudayika Stridhana*, her ornaments and the like) without her consent, and, as a matter of right, only in cases of distress: and in such cases, repayment is optional with him if he is poor. If he uses it in any other case without her consent, he is guilty of a wrong, and is bound to restore it with interest, and if he uses it with her consent, he is bound to make good the principal only, when he is able to do so. But even in this latter case, he is compellable to restore her property, if he neglects her for the sake of another wife.

[In this connection note the following texts.

दुर्भिक्षे धर्मकार्ये च व्याधौ संप्रतिरोधके । गृहीतं स्त्रीधनं भर्ता न स्त्रियै दातुमर्हति ॥

Yajn: II 147.

पुत्रार्तिहरणे वाऽपि स्त्रीधनं भोक्तुमर्हति *but* वृधादाने च भोगे च स्त्रियै दद्यात्सवृद्धिकं ॥

*Devala* cited *Apararka* P. 755.

See also *Katyayana* cited there and Yajn: II 148 (*ubisupra.*)

But property acquired by the wife by gift from strangers, or by the mechanical arts, is always subject to her husband's dominion[1]. So that, if she dies before her husband, the property remains in his possession and passes to his heirs: but if he dies before her, she becomes absolute owner of the property, and at her death, it passes to her heirs, and not to those of her husband.

This right to use the wife's *Stridhan* is personal in the husband, and though he can make use of it to procure his discharge from arrest under a Civil Court's decree, his creditor cannot seize it. 1. Strange 27, 28, 23, 24. cited, Bannerjee.

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1 प्राप्तं शिल्पैस्तु यद्वित्तं प्रीत्या चैव यदन्यतः । भर्तुः स्वाम्यं भवेत्तत्र शेषं तु स्त्रीधनं स्मृतम् ॥

*Katyayana.*

So also, though the husband may use if for removing the distress of any member, such member cannot use it. Nor can the husband bind the wife by his dealings with her property. *Mohima Chunder Roy v. Durga Monee*, 23 W.R. 184.

(c) During widowhood, her rights are larger than during coverture.

**After husband's death.**

Her *Kinsmen* have never any right over her *Stridhan* and the only control that existed *viz.* that of the husband, having been removed, her right becomes unlimited.

As regards her power of alienation.

(1) Moveable property given by the husband, which, she is required to enjoy frugally during his life-time, becomes absolutely alienable by her after his death. But.

(2) immoveable property given or devised by the husband, is never at her disposal even after his death, unless the gift or devise is coupled with an express power of alienation. *Ram Narain Singh v. Peary Bhagat*, 9 Cal. 830. It is her *Stridhan*, as far as it passes to her, not his, heirs. But without such power, she appears to be under the same restrictions as those which apply to property which she has inherited from a male, even though the gift is made in terms which create a heritable estate. *Kotar Basappa v. Chenverava*, 10 Bom. 403; *Koonj Behari Dhur v. Premchand Dutt*, 5 Cal. 684; *Annaji v. Duttatraya*, 17 Bom. 503. "So, property acquired by a widow by her skill and labour, or by gift from strangers, would become her *Stridhan*, according all the schools" Bannerji.

III. **Restrictions depending on the nature of the property:** Her power over property acquired by gift, devise, art or purchase, has already been determined.

**As to property Acquired by inheritance:**

(1) In **Bengal**, it can never be Stridhan, whether inherited from a male or a female. On her death it passes to the next heir of the male or female who originally held it, and not to her heirs. See *Hari Dayal Singh Sarmana v. Grish Chunder Mukerji*. 17 Cal. 911 at 916.

(2) In **Madras**, the same rules has been laid down. *Venkata Ramakrishna Rao v. Bhujanga Rao*, 19 Mad. 107; *Virasangappa Chetti v. Rudrappa Chetti*. 19 Mad. 110. To the same effect are **other schools**, branches of the Mitakshara.

(3) In **Bombay** A woman is on a much better footing as regards property inherited by her. She has been held to possess absolute power of alienation over moveable property inherited from her husband *Bechar Bhagwan v. Bai Lakshmi*, 1 Bom. 56; *Pranjivandas v. Devakumarbai*. 1 Bom. 130: and over all property, both moveable and

immoveable, inherited from her father or her brother. *Vinayak v. Luxmibai.* 1 Bom. 117. Her power of alienating moveables inherited from her husband is limited to alienations during her life-time, and does not extend to testamentary disposition of it so as to displace the right of inheritance by her husband's heirs. *Gadadharbhat v. Chandrabhagabai*, 17 Bom. 690 [**F.B.**] followed in *Chaman Lal v. Ganesh*, 6 Bom. L.R. 460.

Females, inheriting in their family of birth *e.g.*, daughter & sister take absolutely while those inheriting in their family of marriage, *e.g.* widow, daughter-in-law, take a limited interest. *Bhagirithibai v. Kanhuji Rao.* 11 Bom. 285: *Gadadharbhat v. Chandabhagabai*, 17 Bom. 690 (**F.B.**) *Tuljram v. Mathuradas*, 5 Bom. 662: *Rindabai v. Anacharya* 15 Bom. 206.

(2) The share which the mother gets on partition of the joint family property becomes her *Stridhan*, which devolves, on her death, upon her own heirs and not upon the heirs of her husband. *Chhiddu v. Naubat*, 24 All. 673: and she can alienate it at pleasure. *Sri Pal Rai v. Suraj Bali*, Ibid 82.

*N. B.*—[1] *Stridhana* promised by the husband, may be claimed by her from his heirs like a debt. ( भर्त्रा प्रतिश्रुतं देयमृणवत्स्त्रीधनं सुतैः *Devala.*)

(2) Unchastity, according to the texts, works a forfeiture of a woman's right for acquiring or retaining *Stridhan.* But the rule has never been enforced by courts. In an old case, an adulteress was declared entitled to her parent's gift of jewels [see Mac Naghtan's Precedents, Ch: VII. Ca: 7]and in *Mussammat Ganga Joti v. Ghasita* 1 All. 46 [**F.B.**] it has been held that unchastity in a woman does not incapacitate her from inheriting, [per Turner C. J. and Oldfiled J.] or keeping possession by right of, *Stridhan* [per *Pearson & Spankie* J.J.] followed in *Nogendra Nondini Dossi v. Benoy Krishna Dat*, 30 Cal. 521.

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## C. Succession to Stridhana.

From what has gone before, it will be seen that the word *Stridhan* has been variously interpreted in different schools, and even under the *Mitakshara* School with the general acceptance of its denotation, there

are variations in the cannotation of the term. It will be convenient to refer to the several schools and give the orders of succession separately.

**A.** According to the **Mitakshara.** अतीतायामप्रजसि बांधवास्तदवाप्नुयुः ॥
अप्रजस्त्रीधनं भर्तुर्ब्राह्मादिषु चतुर्ष्वपि । दुहितॄणां प्रसूताचेच्छेषेषु पितृगामि तत् ॥

Yajn. II 144, 145.

From Vijnaneshwara's commentary upon this text, the following order of succession may be deduced.

1. Daughters, unmarried. [अनूढाः]
2. „ married, unendowed (अप्रतिष्ठिताः)
3. „ „ endowed (प्रतिष्ठिताः)
4. Daughter's daughter.
5. „ son.
6. Son.
7. Grandson.
8. The unmarried daughter of a rival wife of a superior class.

स्त्रियास्तु यद्भवेद्वित्तं पित्रा दत्तं कथं च न । ब्राह्मणी तद्धरेत्कन्या Manu IX. 198.

9\. (A) In default of all these, if the marriage was in an approved form, the property passes, according to *Vijnaneshwar*, to the husband.

[According to *Kamalakara* the author of the *Nirnayasindhu*, in default of the husband, the daughter, son, and daughter's son of the rival wife: and in their default, the mother-in-law, the father-in-law, the husband's brother, his sons and other next of kin of the husband.]

9\. (B) If the marriage was in an unapproved form, it passes to her parents, the mother taking before the father.

**B.** According to the **Mayukha.**

[He divides Stridhan into technical and non-technical for the purposes of succession. In the technical he includes (A) Anvadhaya, Pritidatta, Yautaka and other Stridhan, (B) Bandhudatta and (C) Sulka.

A. (*a*) To Anvadhaya and Pritidatta of the husband, the heirs are:

(i.) Son and unmarried daughters equally (with little presents to married daughters).

or (ii.) Son and married daughters equally (with little presents to daughter's daughter) (*Sitabai v. Wasanta Rao*, 3 Bom. L.R. 201.)

(*b*) Yautaka goes to unmarried daughters.

(*c*) To other technical Stridhan not specially provided for, the heirs are the same as under *Mitakshara* with very slight difference (noted below in italics).

1. Destitute unmarried daughters.
2. Other Do.
3. Indigent married daughters (with the *daughters of a Brahman co-wife.*)
4. Other .. ..
5. *Daughter's issue* (male and female take together; taking *per stirpes* by their mother, not *per capita*).
6. Male issue (sons grandsons and great-grandsons).
7. (*a*) Husband (when marriage in an approved form).

   (*b*) Father ( . ——————unapproved—).
8. Husband's or father's next relations as the case may be.
9. Ultimate heirs (noted under the text of *Brihaspati* later on.)

B. Bandhu Datta, in case of a marriage in a disapproved form.

1. Bandhus and in their absence.
2. Sons.

C. Sulka (See special rules below).

In the case of non-technical Stridhan.

(1) *Male issue* (*i. e.* sons, grandsons, great-grandsons) — See Telong J in *Manilal v. Bai Rewa*, 17 Bom. 758 and other cases discussed

(2) *Daughters.*

(3) *Daughter's issue.*

(4) Same as for Technical Stridhan.

**C.** According to the **Smriti Chandrika**, the course of succession is in many important respects similar to the law of Mayukha on the subject, except that it does not distinguish between technical and non-technical *Stridhan*.

(1) Like Mayukha, it allows sons and unmarried daughters to succeed simultaneously to the *Anwadheya Pritidatta* and affectionate gifts by husband. But widowed daughters do not take with sons.

(2) To the Yautaka, again like Mayukha, maiden daughters alone succeed, then the sons, the line of succession further is not laid down.

(3) In other respects, its rules are the same as under *Mitakshara*.

**D.** According to **Jimutavahana**, author of the Dâyabhaga, the *Stridhan* property is divided, for the purpose of succession, into (1) Maiden's property, (2) Ayautaka (3) Yautaka and (4) Pritidatta.

(1) As to maiden's property see special rules under *Shulka*.

(2) To the Ayautaka.

(1) Sons and unmarried daughters simultaneously.

(2) Married daughters who have or are likely to have *male* issue.

(3) Son's son.

(4) Daughter's son.

(5) Great grandson.

(6) Step-son.

(7) His son.

(8) .. grandson.

(9) Widowed and sonless daughter.

(10) Brother.

(11) Mother.

(12) Father.

(13) Husband.

(3) To the *Yautaka*.

(1) Unmarried daughter, (2) Betrothed daughter, (3) Married daughter (4) Widowed daughter, (5) Son (6) Daughter's son (7) Son's son (8) Son's grandson (9-11) Step-son, his son and grandson: and

| When the marriage is in an approved form. | When it is in an unapproved from. |
|---|---|
| (12) Husband. | (12) Mother. |
| (13) Brother. | (13) Father. |
| (14) Mother. | (14) Brother. |
| (15) Father. | (15) Husband. |

(4) To the Stridhan given by parents, the unmarried daughter alone inherits.

In her absence the general rule as to Stridhana prevails.

Under the Daya Bhaga law a step-sister's son has preference to a widow's Stridhan over a husband's elder brother. *Dasharathi Kundu v. Bipin Behari*, 32 Cal. 261.

**N.B.** From this enumeration of heirs under different schools it will be found that the line given by the *Mitakshara* is given almost everywhere with slight variations here and there.

**Ultimate heirs:** Failing all these heirs severally enumerated, *Brihaspati*, lays down a rule which equally applies to all the schools, and which supplements, the list of primary and secondary heirs. His rule is as follows.

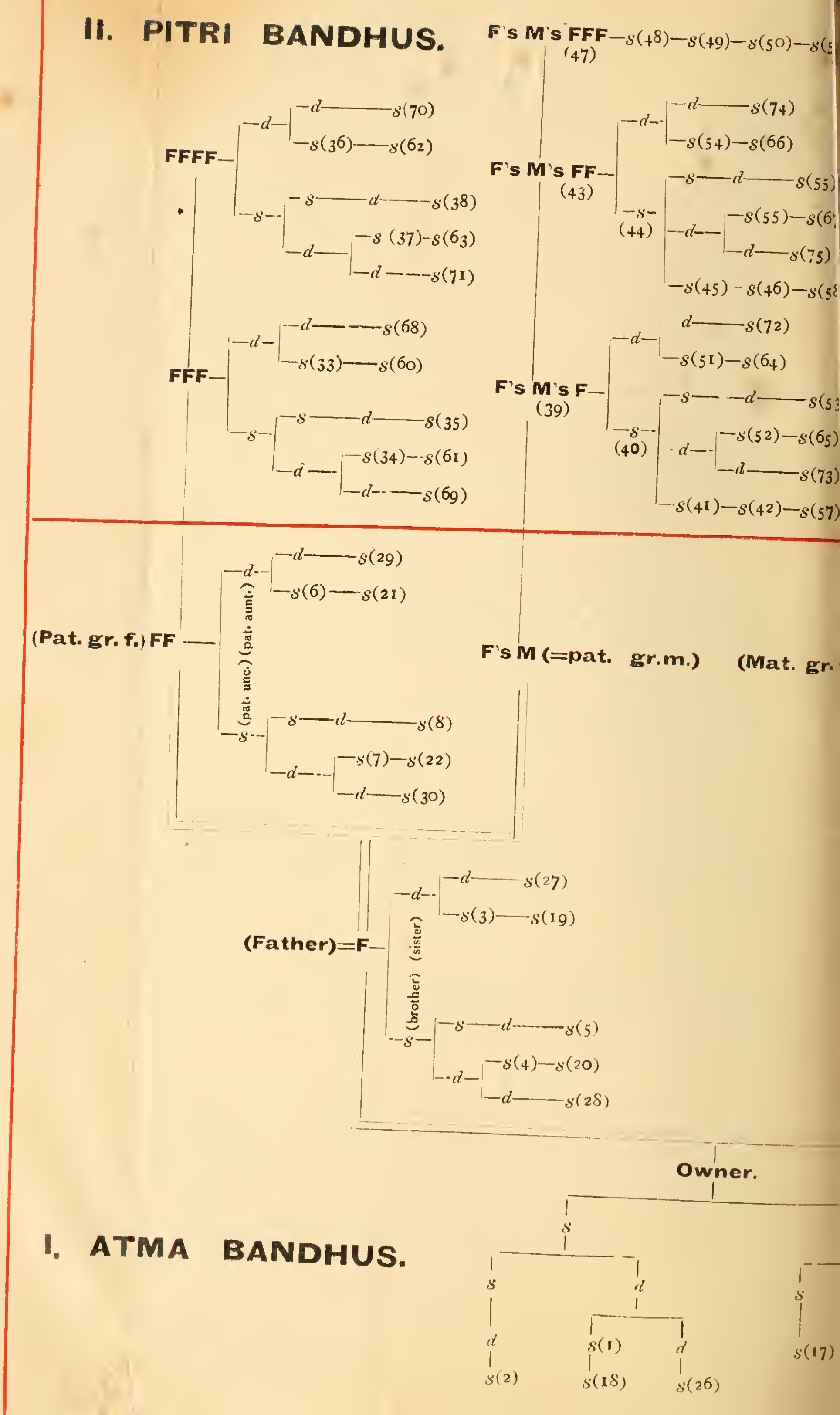
मातुः स्वसा मातुलानी पितृव्यस्त्री पितृष्वसा । श्वश्रूःपूर्वजपत्नी च मातृतुल्याः प्रकीर्तिताः ॥
यदासां औरसो न स्यात्सुतो दौहित्र एव वा । तत्सुतो वा धनं तासां स्वस्रीयाद्याः समाप्नुयुः ॥

Yajn: XXV 88-89.

"To a male, the females related as the sister of his mother, the wife of his maternal or of his paternal uncle, the sister of his father, the mother of his wife, and the wife of his elder brother are like his mother; and so to a female, the males related in the reciprocal way, as her sister's son, her husband's sister's son, her husband's brother's son, her brother's son her daughter's husband and her husband's younger brother, are like her son. And these last mentioned relations of a female being like her sons, inherit her *Stridhana* if she leave no male

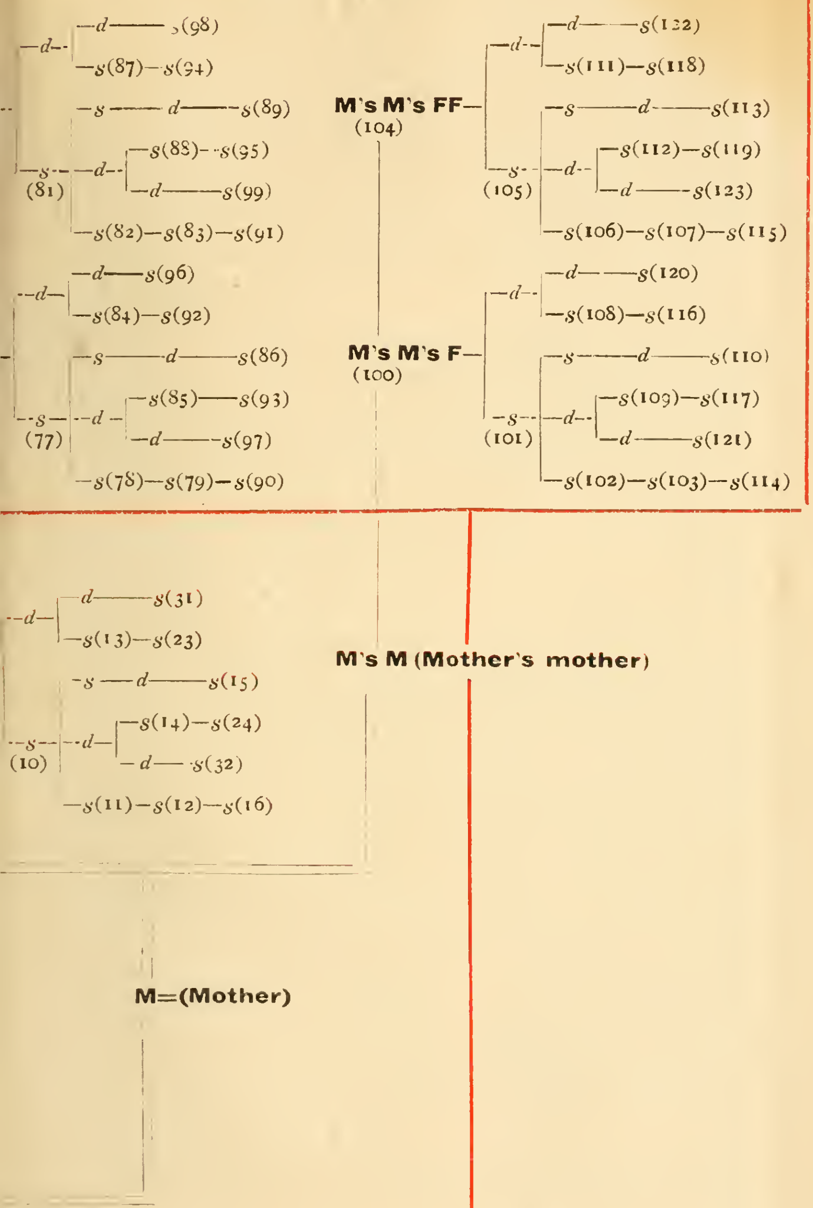
ORDER OF SUCCESS

[See s



NG BANDHUS.

# MATRI BANDHUS.



issue nor son of a daughter, nor a daughter. "Bannerji's Stridhan Pp. 387, 388. per Subramanya Ayyar J in *Venkatasubramaniam Chetty v. Thayarammal*, 21 Mad. 268. Thus the ultimate heirs would be (1) Sister's son (2) husband's sister's son (3) husband's brother's son, (4) Brother's son (5) Daughter's husband (6) husband's younger brother.

It is, however, very much doubtful in what order these persons enumerated in the text of *Brihaspati* take. Chandavarkar J. in a very recent case, after an examination of the text and the particular manner in which it has been quoted by *Nilakanth*, has held, that the question of priority among the heirs enumerated here, must be determined with reference to the rule of propinquity. According to that rule, as between the younger brother of the husband of a deceased woman and the son of a brother of her husband, the former has a preferential right to inherit her technical Stridhan. *Hunsraj v. Bai Moghibai* 7 Bom. L. R. 622 631.

**Special Rules.**

(1) **Succession to maiden's property:** "Of an unmarried woman deceased, (1) the brothers of the whole blood shall take the inheritance, then (2) the mother, (3) the father and (4) his nearest relatives." The result is that her property is kept in her own family. In fact she has no other family than the one to which she belonged by birth.

All presents which may have been received from the bride-groom are to be returned after deducting the expenses already incurred on both sides.

(2) **Shulka** (शुल्क): This word has already been explained above.

**Of a married woman.**

The rule is "भगिनीशुल्कं सोदर्याणामूर्ध्वं मातुः" **Dr. Buller** interprets this as follows: "the sister's fee belongs to her uterine brothers, if her mother be dead:" According to the **Dayabhaga** the uterine brothers would come first, and then mother and father. **Balambhatta** says, however, that the word mother in this rule refers to the woman who received the *Shulka* and not to her mother and so, Dr. Myer, translates the text thus: "after the death of the mother, her fee passes to her uterine brothers." Some think that it belongs to them even during her life-time. The **Benares School** treat Shulka as an exception to the general rule that a woman's property goes to her daughters, and make it pass at once to her brothers, and in default of them, to the mother. This is the view of the **Mitakshara**. According to **Mayukha** the order is *uterine* brother, mother, and father.

(3) जनन्यां संस्थितायां तु समं सर्वे सहोदराः । भजेरन्मातृकं रिक्थं भगिन्यश्च सनाभयः ॥

Manu IX. 192.

["On the death of the mother, all the uterine brothers as well as all the uterine sisters equally divide the maternal wealth."]. This rule refers necessarily to property other than *Yautaka*. *Vijnaneshwara*,

however, recognizing only one line of descent to स्त्रीधन except शुल्क, explains this text, not as meaning that brothers and sisters take together, but that the sisters take first and brothers afterwards, each class sharing equally *inter se*. *Nilkanta* does not approve of this interpretation, and lays down that unmarried daughters and sons inherit simultaneously. The *Smritichandrika*. *Viramitrodaya*, *Virada-Chintamani* and *Varadaraja* all agree with Mayukha in the interpretation, and take this text literally as prescribing a different course of descent for the two sorts of *Stridhana* there specified *viz*.

[1] Gifts subsequent to marriage received either from the woman's own family or the family of her husband and

[2] Gifts received from her husband.

These are shared simultaneously and equally by the woman's sons and daughters [being] unmarried. Those who are married, and grand-daughters, only receive a trifle, as a mark of respect, and widows are wholly excluded. But if there are no unmarried daughters, married daughters whose husbands are living are also allowed by *Katyayana* to share with their brothers. According to the *Mayukha*, property received by a married woman from a stranger, and her own earnings, pass to her sons &c. first and then to her daughters. *Mani Lal v. Bai Rewa*, 17 Bom. 758.

**Cases.**

Property inherited by a female from a female is not her Stridhan in such a sense that on her death it passes to her *Stridhan heirs* in the female line to the exclusion of males. In such a case, sons are entitled to succeed in preference to daughters. *Sheo Shankar Lal v. Debi Sahai*, 25 All. 468. (**P.C.**), and there is no distinction between property inherited by a woman from a male and from a female. *Sheo Partab v. The Allahabad Bank*, 25 All. 476. (**P.C.**)

In Bombay, it was held, that a paternal grand mother in Gujarat, inheriting moveable and immoveable property from her maiden granddaughter, takes an absolute interest in such property, and on her death, it passes to her heir and not to the heir of the granddaughter, and the grandmother can dispose of such property by will. *Gandhi Maganlal v. Bai Jadab*, 24 Bom. 192(**F.B.**); See also *Tuljaram v. Mathuradas*, 5 Bom. 662.

When the Stridhanam property of a woman devolves on her sons, who with their father, form an undivided Hindu family at the time of the mother's death, the sons take it as co-owners or tenants in common without benefit of survivorship. The Stridhanam property of a woman (with a single exception) primarily descends upon her daughters, and, in default of a daughter on the daughters' offsping, females having precedence over male offspring. It is only in default of the daughters' line that sons succeed to their mother's Stridhanam. *Venkayamma Garu v. Venkataramanayyamma Bahadur Garu*, (I.L.R., 25 Mad. 678, explained.) In the Mitakshara, no distinction is made between "obstructed" and "unobstructed" heritage in respect of the devolution of Stridhanam

property. The definitions of "obstructed" and "unobstructed" heritage given therein refer in terms only to the property of a male. In the Hindu Law, the word "ancestor" is not used in the wide sense in which it is used in English Law as merely equivalent to the "propositus" and as co-relative of "heir." In the Hindu Law it is used only as signifying a direct ascendant in the paternal or maternal line, and, more technically, as signifying the paternal grandfather and his ascendants in the male line. Where, on the death of a maternal uncle, his estate devolves by inheritance on his sister's sons, who at the time are undivided members of a Hindu family governed by the Mitakshara law, they take it as co-owners or tenants in common without benefit of survivorship. *Karuppai Nachiar v. Sankaranarayanan Chetty*, 27 Mad. 300.

**Succession of daughters**: Comparative poverty is the only criterion for settling the claims of daughters. *Audh Kumari v. Chandu Dai*, 2 All. 561. In Madras where several daughters succeed jointly they take a joint estate, and upon the death of one of them, others take by survivorship. *Sengamala ammal v. Valayuda*, 3 Mad. 312.

In Bombay it has been held that though the Courts ought not to go minutely into the question of comparative poverty, yet where the difference in wealth is marked, the whole property passes to the poorest daughter. *Totawa v. Basawa* 23 Bom. 239.

**Effect of Unchastity**: Unchastity in a woman does not incapacitate her from taking the Stridhan by inheritance. *Ganga Jati v. Ghasita* 1 All. 46 followed in *Nogendra Nandini Dasi v. Benoy Krishna Deb*, 30 Cal. 521; *Angammal v. Venkata Reddy*, 26 Mad. 509. A female disqualified for inheriting the property of a male is not incapable of holding *Stridhana*. *Vallab v. Bai Hari Ganga*, 4 Bom. H.C.R. 135 (A.C.J.)

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**Examination**: QUESTIONS:—1. Define *Stridhan* and distinguish it from estates otherwise held by a woman.

2. Clearly point out the nature of the estate taken by a widow, daughter, sister and mother. What is the law in Bombay? Trace the growth of the doctrine that "an estate taken by a woman is limited in its nature. Does it hold in Bombay? Discuss, citing cases.

3. Estimate the power of a widow in Western India over her husband's moveables and immoveables? To what extent and under what circumstances can she alienate these? What is the extent of her power over the accumulations? How far is her position affected by the rights of reversioners?

4. Give the several kinds of *Stridhan* describing each briefly.

5. Give shortly the rules of succession to woman's *Stridhan* under the *Mitakshara*, *Mayukha*, *Smriti Chandrika*, and *Daya Bhaga* systems.

6. What is a technical *Stridhan*? How does it differ from the non-technical? Estimate the effect of this distinction on the Law of succession by special reference to decided cases.

# CHAPTER XIII.

## Wills.

## (Testamentary Succession).

**General:** Sir H. S. Maine has observed "in all indigenous societies a condition of Jurisprudence in which testamentary privileges are not allowed, or rather not contemplated, has preceded the later stage of legal development in which the mere will of the proprietor is permitted with more or less restriction to overrule the claims of his kindred in blood;" and India has not been an exception to this. "In fact, the right of making a will is not even provided for by the Smritis. There is no word in the Indian languages which accurately conveys the conception of a will as understood by Western lawyers. The very idea of a will with incidental change in the devolution of property after death, at the mere will of an individual is opposed to the fundamental principles of a Hindu Joint family. The practice of making wills is comparatively of modern origin. After having obtained judicial sanctions for a number of years, it has finally received the sanction of the Legislature." The practice of making wills is more frequently to be met with in earlier days in the Presidency towns, where the example of Englishmen making wills led their Native friends coming in constant contact with them to follow up the practice. Another incentive to this practice may probably have been afforded by the insubordination of sons, to check which, the injured father must have freely availed himself of this new instrument.

**Wills unknown to Hindu Law.**

When wills first began to be made by Hindus it is imposible to say with certainty? The earliest known will is that of Omichand, dated 1758. In Bengal the testamentary power of Hindus was recognized by the English Courts at a very early date. The first reported case of this description is that of *Munnoolall v. Gopee Dat*, (Montriou's H. L. Cases P. 290). Next note the following cases *Russick Lall Dutt v. Chittan Churn Dutt*, (Ibid 3041) 1789. The *Nadiya Rajah case*, laid down that a Hindu father has power to make an actual disposition of property by will, even contrary to the injunction of the law. (The instrument under consideration in that case was, however, a gift and not a will.) Several cases followed this, and the validity of wills in Bengal was finally established by the Supreme Court in 1831. In **Madras** and **Bombay** it took a long time for this question to be settled in favour of the validity of wills by Hindus. See the cases of *Valinayagam v. Pachechi*, 1 Mad. H.C.R. 326; *Narottam v. Narosandas*, 3 B. H.C.R. 6; *Lakshmi Bai v. Ganpat*, 5 Bom. H.C.R. 129.

**Historical Account.**

### Who can make a will: and what property can be willed away?

The law as to the capacity of making a will is the same here as in England, and any one having a sound disposing mind can make a will under the Hindu Law. The extent to which his disposition by will would go, depends chiefly upon the nature of the estate dealt with. All that could be the subject-matter of alienations *inter vivos* can as a rule be given away by will. And very recently it has been held that property which a paternal grandmother inherits from her maiden

granddaughter was her absolute property and she could make a valid will of the same. *Gandhi Maganbai v. Bai Jadhab* 24 Bom. 192. But ancestrals cannot be willed away *Nagalingam Pillay v. Ramachandra Taver* 24 Mad. 429.

It should be noted, however, that all that could be validly disposed of by alienation *inter vivos* cannot invariably be validly disposed of by a will *e.g.*, though a widow has a wider power of disposition over moveables inherited from her husband, she cannot will them away either under the *Mitakshara* or under the *Mayukha*. *Gadadharbhat v. Chendrabagabai* 17 Bom. 690 [**F.B.**] *Chamanlal v. Ganesh* 6 Bom. L.R. 460, so in the case of a member of an undivided family who, though fully competent to make an alienation during his lifetime to the extent of his share, would not be allowed to dispose of his share in joint family by will *Lakshman Dada Naik v. Ramachandra Dada Naik* 7 I.A. 181; 5 Bom. 48; 1 Bom. 561. He can authorize an adoption by his widow after his death and such adoption would be perfectly valid. *Bachoo v. Khushaldas* 4 Bom. L. R. 883; 6 Bom.L.R. 268.

**Exceptions**

**How made and revoked:** Form of the will. No special form is necessary. It may be in writing or may be made orally. (*a*) When it is in writing it is not material in what language it is written, provided it is not disputed that the testator understood its contents. It may more over, be written wholly or partly, in pencil. It need not have been attested before the Hindu Wills Act was passed. *Mancharji Pestanji v. Narayan* 1 Bom. 77: *Radhabai v. Ganesh* 3 Bom. 7. Nor is it necessary to use any technical words or terms of art, provided the wording is such that the intentions of the testator can be known therefrom. If however, technical words are used, then they are to be construed according to the technical sense, unless, upon the whole, it is plain that the testator did not so intend (b) An oral will is otherwise called a *Nuncupative will*: such a will is valid under Hindu Law: and both moveable as well as immoveable property may be disposed of by it, when the property is beyond the ordinary original civil jurisdiction of the Presidency towns *Bhagwan Dullabh v. Kala Shankar* 1 Bom. 641 *Srinivasammal v. Vijayammal* 2 Mad. 37. *Subbayya v. Subraya* 10 Mad. 251. But a person who rests his title on so uncertain a foundation as the spoken words of a man since deceased is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every

**Strict proof necessary.**

circumstance of time and place *Beerpertah Sahee v. Rajender Pertab Sahee* 12 M.I.A. 1 and in *Hari Chintaman Dickshit v. Moro Lakshman* 11 Bom. 89, a *Waraspatra* (deed of heirship) executed by the widow of a deceased Hindu reciting the oral directions given to her by her husband, was held to be evidence of the oral will of the husband. It was also observed there that such a will by a Hindu would be quite effectual except in cases governed by the Hindu Wills Act.

**Revocation how made?** A will may be revoked by another will or codicil or by burning, tearing or otherwise destroying the original, or by any inconsistant act subsequent to its execution *e.g.*, an authority to adopt given to the widow. *Upendra Lal Boral v. Hem Chandra Boral* 25 Cal. 405. or by a subsequent adoption by the testator himself *Vinayak Narain Jog v. Govind Chintaman Jog* 6 Bom.H.C.R.A.C.J.224. And a will is also considered as revoked by the subsequent birth of a child who was in the womb *Minakshi v. Virappa*. 8 Mad. 89. A will may be revoked by parol, and where definite authority is given by the maker to destroy it with the intention of revocating it, that is in law a sufficient revocation although the instrument is not in fact destroyed. *Partab Narain v. Subhao Koer* 4 I. A. 228, 3Cal.626, and this case was followed in an appeal from Madras, where the deceased, who had made a will while he was ill, put into an envelope and registered and deposited it with the District Registrar. He, however, recovered from his illness and had asked a Vakil to get the document back to him. The document remained with the Registrar on account of some formal objection: and in the meanwhile he died. It was held by the Judicial Committee, affirming the decisions of the High Court and District Judge, that the will was sufficiently revoked. *Venkayyamma Garu v. Venkataramanayya Bahadur Garu* 25 Mad. 678 **(P.C.)**

**Estates that may be created under a Hindu Will*.** In determining the extent of a Hindu's power to create estates or interests in property, it ought to be remembered that Hindu Law and usages have, in modern times, undergone very considerable change, and a Hindu may now create by will any estate or interest in property so long as such estate or interest does not violate any of the fundamental principles of Hindu Law, or is not opposed to or inconsistent with the general rules of inheritance. *Soorjeemony Dasee v. Dina Bundoo Mullick* 9 M.I. A. 123.

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* Before proceeding with the portion which follows, the provisions of the Hindu wills Act, appended at the end of this Chapter may with advantage be read.

**Executory Bequests.** An executory bequest is a devise of a future interest, which is not to take effect at the testator's death, but is limited to arise and rest upon some future contingency. Such bequests would always be valid under the Hindu Law, where they would be so under the English Law, unless it is in violation of the fundamental principles of Hindu Law. *Sonatun Bysack v. Juggut Soondree*, 8 Mad. I.A. 66 In *Soorjee money Dassee v. Deeno Bundoo Mullick* 9 M.I.A. 123 it was held that a Hindu may bequeath property by way of remainder or by way of executory bequest upon an event which is to happen, if at all, immediately on the close of a life in being.

**Facts of the Case:**—

The testator left by will all his property to his five sons. But if any of them died without a male issue, his share was to pass to the sons then living or their sons to the exclusion of his widow, daughter, or daughter's son. One of the sons died, his children and his widow laid claim to his share on the ground that the gift to her husband being absolute, the gift over was invalid. Her claim was rejected, the Privy Council observed "there is nothing against the general principles of Hindu Law in allowing a testator to give property, whether by way of remainder, or by way of executory bequest upon an event which is to happen, if at all, upon the close of a life in being."

Note: For the validity of such a gift or devise under the Hindu Law, the donee must be in existence at the time of the testator's death. (The Tagore case)

**Perpetuity.** See Sec. 101 of the Indian Succession Act (X of 1865).

**General.** A perpetuity " is a grant or other limitation whereby the vesting of a contingent estate or interest is or may be postponed for a longer period than the law permits. The rule against perpetuities is a rule which imposes a kind of restraint on the power of a testator (or donor), preventing him from postponing the vesting of an interest beyond a period fixed by law, within which every interest so created and which is not vested must necessarily become so.

N.B. It will therefore be seen that this rule applies only to contingent and never to vested interests.

**The Rule Stated: The English rule,** is that " a grant or other limitation of any estate or interest to take effect in possession or enjoyment at a future time, and which is not from the time of its adoption a vested interest, will be void *ab initio* if at the time when the limitation takes effect, there is a possibility that the estate or interest limited will not vest within the period of a life or lives in being, or within a further period of twenty one years thereafter."

**The Indian Rule.**—"No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong" (S. 101 of Act X of 1865.)

**The two rules compared and contrasted.**

The Indian rule is somewhat different from the English rule. (a) So far as the lives of persons living at the testator's decease are concerned, both are similar. (b) But the period beyond that time is not the same under the two rules. The English rule lays down the invariable limit of 21 years. But under the rule in India, the testator may tie up his property by testamentary disposition, for one or more lives in existence at the time of his death, *plus* the minority of some person who shall be in existence at the expiration of that period and to such a person the estate may validly go in the end.

Any disposition that runs counter to these limitations is a disposition in perpetuity, and will not be allowed by law.

The leading case to be noted on the point is: "*The Tagore Case*" *Facts*:—the testator who had a large property producing an income of about 2½ lacs had an only son, Ganendra Mohun Tagore, who became a convert to Christianity, and whom therefore the will was intended to disinherit. The will recited that the son had been well provided for, and after several legacies, the trustees were directed to convey the estate to the use of persons who were marshalled in a line of succession in terms and incidents similar to the English tail male. It was held by the Privy Council that such an estate was unknown to Hindu Law and that the instrument was invalid so far as it transgressed the principles of that law. The result was that the son whom it was the main object of the will to disinherit, got in fact the whole residue subject to the life estate of the first of the stocks of the tail mail.

The Tagore case lays down that "all estates of inheritance created by gift or will, so far as they are inconsistant with the general law of inheritance, are void as such, and by Hindu Law no person can succeed as heir to estates described in terms which in English law would designate estates-tail; that in order to make a gift under a will good by Hindu law, the donee, except in the case of an adopted child, or a child *au ventre sa mere*, must be a person in existence, capable of taking at the time when the gift takes effect. A child adopted after a man's death in pursuance of a power given by him is in contemplation of law, begotten by that man. The law of wills among Hindus is analogous to the law of gifts. And even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be

transferred. A person capable of taking under a will must be such a person as to take a gift *inter vivos* and therefore must either in fact or in contemplation of law be in existence at the death of the testator. Trusts are not unknown to Hindu law. They can be created for carrying out such intentions as the law recognizes. There is no reason why a Hindu should not by will create an estate for life."

**An Exception: Charities:**—An important exception to the rule against perpetuities is a gift or devise for purposes useful and beneficial to the public, generally known as 'Charitable uses'. According to English Law such bequests are valid only to the extent of personal property, and when they are in no way connected with land. Among Hindus, however, both moveable and immoveable property may be dedicated in perpetuity to charitable and religious purposes. *Sonatun Bysack v. Juggut Soonderee Dassee*, 8 Moo. I.A. 66. Further, there are certain dispositions of property in perpetuity which are not allowed by English law, but are valid under the Hindu law. The English rule against superstitious uses is not applicable in India. *Rajendra Dutt v. Sham Chand Mitter* 6 Cal. 106: *Bhugabathy Prosonno Sen v. Gooroo Prosonno Sen* 25 Cal. 112. But the disposition in favour of an idol must be real and not merely colourable, otherwise the rule against perpetuities would apply. *Rám Chandra Mukerji v. Ranjit Singh* 27 Cal. 242/249-50. *Surenda Kesher Roy v. Doorga Sundari Dassey* 19 I.A. 108: 19 Cal. 513.

There is, however, a distinction between gifts to religious or Charitable uses or to idols and gifts for "*Dharam*" only. For, while the former are allowed by Hindu Law and are valid (*Parbati Bibee v. Ram Baran Upadhya* 31 Cal. 895.), the latter are never allowed and are held invalid as being too indefinite to be enforced. *Lakshmishankar v. Vaijnath* 6 Bom. 24: *Cursondas Govindji v. Vundravandas* 14 Bom. 482: *Runchoddas v. Parvatibai* 1 Bom. L.R. 607: 23 Bom. 725 (**P.C.**). 26 I.A. 71: *Nagendra Nandini Dasi v. Beny Krishna Deb* 30 Cal. 52

Gifts for specific and particular charities, such as bequests for the performance of ceremonies and giving feasts to Brahmins, digging wells and so forth, stand on another ground and they are valid. *Lakshmi Shankar v. Vaijnath* 6 Bom. 24. *Dwarkanath v. Burroda Pershad* 4 Cal. 443; *Jamnabai v. Khimji* 14 Bom. 1: *Morarji v. Nanbai* 17 Bom. 351: *Advocate General v. Bai Punjabai*, 18 Bom. 551: In *Purnanundas*

*v. Venayekrao Vasudev* 7 Bom. 19: 9 I.A. 86, a direction for erecting *dharamsala* for lodging *sadhoos* and saints was held to be good. And trusts for establishing a temple for "religious and charitable purposes" were recognized in *Jairam Narranji v. Kuverbai* 9 Bom. 491.

Property may also be devised subject to a trust in favour of an idol or for some religious or charitable endowment so that the residue of the property after satisfying the charitable trusts is directed to be used for satisfying bequests to the members of the family for their own use. *Ashotosh Dutt v. Doorga Churn Chatterji* 5 Cal. 438. See also 8 Mad. I.A. 66: *Rupa Jagshet v. Krishnaji Govind* 9 Bom. 169; 25 Cal 112 (*supra*). See also the recent case of *Prafulla Chunder Mullick v. Jogenra Nath Sreemany* 9 C.W.N. 528.

A Hindu in Bengal, by his will, constituted certain religious and charitable endowments, directed that the intermediate interest in certain properties for thirteen years after his death was not to go to his sons but was to be dealt with by the trustees, in carrying out certain specific trusts, after which period the properties were to go to the sons absolutely, and made certain other provisions for the devolution and management of his properties. The executors obtained a probate of the will. Some time after, the eldest son of the testator brought a suit for the administration of the deceased's estate, for a declaration that certain trusts and provisions in the will were invalid, for the appointment of *shebait* etc. *Held*, it was contended by the plaintiff that the trusts created by the testator were invalid by reason of the fact that there was no express gift to any specific idols. It was also contended that, as regards some of the properties, the gift, if any, was to idols which were not in existence. It was evident that the testator had not made specific gifts to particular idols, but what he desired to do was to dedicate some of his properties to specific trusts which his executors and trustees were to carry out in the manner indicated by the will. *Held*, so far as these particular trusts were concerned, there was nothing in the principles of Hindu Law to prevent effect being given to the purposes and intentions of the testator in the manner he proposed. In order to constitute a valid endowment, all that is necessary is to set apart specific property for specific purposes; & where these purposes are, as in the will, clearly religious and charitable in their nature, the trust is not invalid merely because it transgresses against the rule which forbids the creation of a perpetuity.

The plaintiff asked that, in the event of the trusts or any of them being declared to be valid, a scheme might be settled by the Court to carry out such of the trusts as are declared to be valid. *Held*, in the circumstances of the case, no scheme was necessary, A scheme is necessary where a testator, having expressed his clear intention to create a trust, has failed to indicate the means by which the trust is to be carried out. In the present case the testator by his will, has very fully and clearly indicated the methods and means by which the trusts which he has created are to be carried out.

The direction in the will, that the trustees shall keep apart such of the moveables and articles as they shall think necessary for the *Thacoors*, applies to those articles which are suitable for the purposes of worship of the *Thacoor*, and it was not intended to refer to monies in the hands of the executor or to other articles which were inappropriate for the worship of the *Thacoor*.

The provision as to the intermediate interest is valid. The gift to the sons during the period of thirteen years was only a limited one, which was to become an absolute gift of the entire interest on the expiration of thirteen years.

Finally, after stating that there was no necessity for dealing with the appointment of a *shebait* or for a decree for administration or for an account of the estate, the Court indicated, for the guidance of the executors, that, if, after the due administration of the estate, there should be any balance in their hands, it should be dealt with as in the case of an intestacy, and it should be divided amongst the sons of the testator as his heirs.

**Restraints on Alienation :** The general principle that where a transfer is made absolutely, any condition superadded to it whereby the free power of disposition of the transferee is curtailed is valid, also applies in Hindu Law. The same principles govern cases which postpone the enjoyment of a devisee by interposing a previous estate. But if he confers an unintercepted estate upon a devisee, any clause which postpones his enjoyment beyond the period of majority, when he is by law entitled to take possession, is ineffectual and it makes no difference that the property is vested in trustees for the purpose of carrying out the arrangement *Gosavi Sirgir v. Rerett Carnac* 13 Bom. 463 : *Lloyed v. Webb* 24 Cal. 44.

**Accumulations:** Although Section 104 of Act X 1865, which treats of this question, is not extended to Hindu Wills, it has been held in several cases that estates cannot be created by Hindus in contravention of the principles which underlie the Thelluson Act. And it has now been settled on grounds of public policy or of principles of universal application, that trusts for perpetual accumulation, or for an indefinite period, are void. *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* 2 B.L.R. 11 (O.C.): *Amrita Lal v. Surnomoyee Dasee* 24 Cal 589. 25 Cal. 662 (see however the judgment of *Jenkins J.* in 24 Cal. 589. which starts a nice discussion as to the applicability of this principle to Hindu Wills.

*Exceptions :* (1) Accumulations directed to be made for the payment of debts or legacies, or for the benefit of minor legatees till

they attain majority are valid. *Bisso Nath Chunder v. Bama Soondary Dassee* 12 Moor. I.A. 41. 61. (2) See also exception to S. 104 of X of 1865.

**Power of Appointment:** In a recent case the testamentary power of Hindus was extended by the Bombay High Court, by recognising powers, and this extension was sanctioned by the Privy Council. *Bai Motivahu v. Bai Mamubai* 21 Bom. 709 (**P.C.**). But their Lordships of the Privy Council remarked: "While saying this they think they ought also to say that, in their opinion, the English law of powers is not fit to be applied generally to Hindu Wills" at P. 722. But this power must be a power to convey property to a person in existence, either actually or in contemplation of law. at the death of the testator, *Upendra Lal Boral v. Hem Chandra Boral* 25 Cal. 405, where it was held that no valid gift or dedication of property can be made by will to an idol not in existence at the time of the testator's death.

**Bequests excluding heirs or reversioners** : a bequest by which the estate would devolve on male, to the exclusion of female, heirs, or heirs by adoption would be invalid. *Tarakessar Roy v. Soshi Shikhureshwar Roy* 9 Cal. 952: 10 I.A. 51: 13 C.L.R. 62. So also the creating of a special right of reversion has been held to be void *Sri Raja Rau Venkata Kumara Mahipati Surya Rau v. Sri Raja Ram Chellayamoni*, 17 Mad. 150: *Lakshmakha v. Boggaramanna* 19 Mad. 501. The words *putra poutradi Krame* are not intended to limit the succession to male descendants only, to the exclusion of females. *Ram Lal Mukerjee v. Secretary of state* 7 Cal. 304.

**Disinheritance**: In Bengal, property may be disposed of so as to disinherit the lawful heirs. But under the *Mitakshara* this power is much restricted, and is always subject to the rule of survivorship *Minakshi v. Virappa* 8 Mad. 89. *Lakshman Dada Naik v. Ramchandra Dada Naik* 1 Bom. 561. In order that there should be a valid and effective disinherision, the intention to disinherit must be clearly and unambiguously expressed, and it was held in the *Tagore Case* that the son cannot be disinherited by words expressing that he is not to take any benefit under the will. Further, mere bequest of special portions of the testator's estate to the heir without the language of disinherision does not exclude him from the undisposed of residue. *The Tagore case*; *Lalubhai v. Mankorbai* 2 Bom. 388: *Toolsey Das*

*Ludha v. Premji* 13 Bom. 61: and the effect of an ineffective devise is, that it cannot take effect as if it had never been made at all. and the property passes to the heir as undisposed of residue.

The same principles would apply in the case of *double portions*

"According to the rule of English Law as to double portions, when the two provisions are of the same nature or there are but slight differences, the two instruments afford instrinsic evidence against a double provision : but, when the provisions are of a different nature, the two instruments afford intrinsic evidence in favour of the double provision. This rule may well be borne in mind as a principle of equity, justice and good conscience, in ascertaining the intention of a Hindu testator from the terms of his will." per Chandavarkar J. *Jugjivandas Karamchand v. Brijdas Lalji*, 7 Bom. L. R. 299.

**The doctrine of election** applies to wills made in India. D. a Hindu widow, died, making a will in respect of property which she had inherited from her husband. She bequeathed Rs. 2,000 as a legacy to the plaintiff and the immoveable property to K, the defendant's father. Plaintiff and K, were the heirs of her husband. The Plaintiff sued for the legacy under the will, and for half the immoveable property as heir. *Held*, that the plaintiff should be put to his election whether to take the legacy under the will, or half the property as heir of the testator's husband. *Mangaldas v. Ranchhordas* 14 Bom. 438.

Lastly, as regards possession, it is not necessary for a devise: nor is it necessary that the legatee should be capable of assenting to it. Therefore a bequest in favour of an idiot or a lunatic or a person incapacitated from taking as heir will not be invalid.

**Examination: Short Summary**: Wills are not an institution of Hindu Law at all; but they owe their origin to the intercourse of Natives with Englishmen. Any one who has a sound disposing mind may make a will. No special terms are necessary. It may be in writing or by word of mouth; when in writing it may be in ink or in pencil or partly in ink and partly in pencil; it may moreover be attested or not. An oral will however, must be strictly proved. It is revoked by being torn, destroyed, cancelled; or by another will or codicil; or by dispositions subsequent to the will and inconsistent with its provisions. The intention to revoke

may be deduced from surrounding circumstances. As to estates and interests that may be created under a Hindu will, all the rules and limitations of English Law apply generally to the Hindu Will, except that in the case of perpetuities, instead of 21 years, the minority of persons who may be in existence at the close of the intermediate life is the limit to which the vesting of the interest may be postponed. Further, the English rule against superstitious uses does not completely obtain in India; as here bequests to charities and idols are upheld. The doctrine of election applies to Hindu wills. No special capacity is necessary for the donee under the will.

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QUESTIONS:—1. Give a short account of the wills in India and trace their introduction into this country.

2. Who can make a will and what property may be disposed of under it? Estimate the extent of a woman's power of testamentary disposition in India. Can the member of a joint Hindu family dispose of his undivided portion of a will?

3. Explain the rule against perpetuity. How far does it apply in India?

4. Can accumulations and restraints on alienations be allowed in a Hindu's will?

5. What is the doctrine of election? how far does it apply to a Hindu's will.

## APPENDIX A TO CHAPTER XIII.

# The Hindu Wills Act XXI of 1870.

S. 2. The following portions of the Indian Succession Act, 1865, namely:—

Sections 46, 48, 49. 50, 51, 55 and 57 to 77 (both inclusive).

Sections 82, 83, 85, 88 to 103 (both inclusive).

Sections 106 to 177 (both inclusive), and section 187, shall notwithstanding anything contained in section 331 of the said Act, apply—

*(a)* to all wills and codicils made by any Hindu, Jain, Sikh, or Budhist, on or after the first day of September one thousand eight hundred and seventy within the said territories or the local limits of the ordinary original civil jurisdictions of the High Courts of judicature at Madras and Bomay; and

*(b)* to all such wills and codicils made outside those territories and limits, so far as relates to immoveable property situated within those territories or limits.

S. 3. Provided that marriage shall not revoke any such will or codicil:

And that nothing therein contained shall authorize a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for Section 2 of this Act, he could not deprive them by will. And that nothing herein contained shall affect any law of adoption or intestate succession.

And that nothing herein contained shall authorize any Hindu, Jain, Sikh or Budhist to create in property any interest which he could not have created before the first day of September one thousand eight hundred and seventy.

Sections of Indian Succession Act referred to in, S. 2 of this Act.

S. 46 Persons capable of making wills.

S. 48 Will obtained by fraud, coercion or importunity.

S. 49 Will may be revoked or altered.

S. 50 Execution of unprivileged will

S. 51 Incorporation of papers by reference.

S. 55 Witness not disqualified by interest or by being executor.

S. 57 Revocation of unprivileged will or codicil.

S. 58 Effect of obliteration, interlineation or alteration or alteration in unprivileged will.

S. 59 Revocation of privileged will or codicil.

S. 60 Revival of unprivileged will.

S. 61 to S. 77 of the construction of wills,

S. 82 Bequest without words of limitation.

S. 83 Bequest in alteration.

S. 85 Bequest to class of persons under general description only.

S. 88 to S. 98 construction of wills.

Ss. 99 to 103 Of void bequests.

Ss. 106 to 108 The vesting of legacies.
Ss. 109 to 112 Onerous bequests.
Ss. 113 to 124 Conditional bequests.
Ss. 125 to 127 Bequests with directions as to application or enjoyment.
S. 128 Bequests to an executor.
Ss. 129 to 136 Specific legacies.
Ss. 137 and 138 Demonstrative legacies.
Ss. 139 to 153 Ademption of legacies.
Ss. 154 to 157 Subject of bequests.
S. 158 Bequest of things described in general terms.
S. 159 Bequest of interest produce of fund.
Ss. 160 to 163 Bequests of annuities.
Ss. 164 to 166 Bequests to creditors and proprietors.
Ss. 167 to 177 Election.
S. 187 Right as executor or legatee when established.

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# INDEX.

**** The figures refer to pages.*



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# ERRATA.

NOTE:—The main portion of the corrections is from the Sanskrit texts.

Page 6 line 11 for Moslemah *read* Moslem.

„ 7 line 4 for १-८. *read* १-७.

Page 23 line 18 for Adjudications *read* Adjudication.

Page 32 line 2 for Marriage and Sonship *read* Marriage.

Page 38 line 5 for असपिण्डा च मातु *read* असपिण्डा चया मातु &c.

„ „ line 12 for शूद्रामुद्या *read* शूद्रामुद्वा.

„ „ line 17 for सपिंडतानिवर्तेत *read* सपिंडता निवर्तेत.

Page 41 line 27 for would not be *read* would not lie.

Page 47 „ for धर्मकार्मे *read* धर्मकार्यें.

„ „ „ for पुत्रार्ति हरणे *read* पुत्रार्तिहरणे.

„ „ „ for स्त्रिधनं *read* स्त्रीधनं.

„ 48 „ for ब्राह्मे *read* ब्राह्मो.

„ 86 line 26 for भवेत्सहा *read* भवेत्सह.

„ 90 line 11 for S. 99. *read* Sqq.

„ 95 line 10 for qualifications *read* qualification.

„ 97 line 15 for *Jamnodas vs. Allu Marrin* read *Jamnadas vs. Allu Marria.*

„ 98 line 28 for *Ganpal* read *Ganpat.*

„ 104 note; for कामक्रोधसुराद्यत *read* कामक्रोधसुराद्यूत.

„ 148 line 4 for सष्ट *read* सृष्ट.

„ 200 note line 2 for यत्किंक्रचिच्छ्वाश्वा *read* यत्किंकाचिच्छ्वश्वा.